



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW LIBRARY



Copy 1

REPORTS

OF

CASES DETERMINED

IN THE
SUPREME
CONSTITUTIONAL
COURT
OF
SOUTH-CAROLINA.



SOUTH-CAROLINA.

BY THE STATE REPORTER.

VOL. I.

COLUMBIA:

PRINTED BY BLACK & SWEENEY.

1824.

KFS
1845
A19
1823

CONSTITUTIONAL COURT
OF
SOUTH CAROLINA,

COLUMBIA,
NOVEMBER TERM, 1823. }

JUSTICES PRESENT.

ABRAM NOTT,	D. JOHNSON,
C. J. COLCOCK,	J. S. RICHARDSON,
R. GANTT,	D. E. HUGER.

DANIEL A. MITCHELL, vs. PARHAM & DAVIS.

The word "sealed," inserted in the body of an instrument, promising to pay money, will not make it a specialty, without a seal, an (L. S.) or some equivalent mark annexed.

By the whole Court.

WM. REED, vs. WM. PRICE.

Action on a promissory note. Defence, failure of consideration. The note was given for negroes. They were proven to have been, about twenty-seven years ago, the property of B. who died about that time, leaving other slaves, and a wife, two sons and a daughter. After B's death, the negroes went into the possession, and have since continued in the possession of his daughter—or of her trustees, agents or assignees. No administration or distribution of the estate of B. shewn. Held that after so long possession, with the fact that B. died possessed of other slaves, a distribution of B's estate will be presumed; and that the slaves in question were the share of the daughter.

THIS action was brought on a Promissory Note, not negotiable, drawn by Defendant in 1817, and assigned by the payee to the Plaintiff.

4 SOUTH-CAROLINA STATE REPORTS,

WM. REED, vs. WM. PRICE.

The execution of the note was not denied; but the Defendant contended that it was given for negroes, to which the payee was not entitled; and that consequently there was a failure of consideration.

It appeared that the negroes in question were the descendants of a woman, who was sent, with some others, to this state about twenty-seven years ago, by a Mr. Butler, who was then residing in Virginia. Mr. Butler intended to follow with his wife and three children, but was prevented by death. His widow and children (two sons and a daughter) emigrated here soon after, and got possession of the negroes. The woman, whose children were purchased by Defendant, was held by Mrs. Butler, as her daughter's property, for six or seven years after her arrival here. On the death of Mrs. Butler, her brother, Dr. ———, took possession of the woman, and held her as the property of his niece. On her intermarrying with Thomas Bulow, the woman was delivered to him. He had possession of her for several years; and ultimately sold her and her children, to the Defendant. During the whole of this period, these negroes were regarded as the property of Mrs. Bulow. To gratify the Defendant, the elder Butler, (brother of Mrs. B.) consented to join in the bill of sale: the younger had left the state some time before and was supposed to be dead. Subsequently, however, to the sale, he returned; but has never pretended that he was entitled to the negroes, or any part of them. It did not appear how the estate of the elder Butler had been divided, or that any administration had ever been granted. Verdict for Plaintiff. From this there was an appeal.

The opinion of the Court was delivered by Mr. Justice Huger.

The defence in this case is a failure of consideration in part for the note. It is contended that the younger Butler was entitled to a part of the negroes, and therefore his brother and sister could not sell more than their right; which was but two-thirds. What became of the rest of the intestate's estates, does not appear. That there were other negroes, has not been denied. This fact, when coupled with the twenty-seven years quiet possession of Mrs. Bulow, raised an irresistible presumption that she got this negro as her distributive part of the estate

JOHN RODGERS *ads.* ISAAC NORTON.

of her father; and that to her two brothers and mother, were allotted the other negroes. If this had not been so, it is difficult to account for the forbearance of the younger Butler. How old he was when he first came to this state, twenty-seven years ago, does not appear. Since that period (whatever may have been his age then) he has had ample time to prosecute his rights, if he had any. In the case of *Mr. Clure and Hill*, (2 Con. De. 420) it was decided that thirty years possession of land was sufficient foundation for the presumption of a grant from the state; and the judge who delivered the opinion of the court, suggested that twenty would be sufficient. If in twenty years a grant may be presumed against the state, after twenty-seven, the younger Butler may very well be regarded as having relinquished his claim to the property in question. If this presumption could require any further support, it is to be found in the fact, that Defendant himself has held these negroes long enough to perfect his title by possession.

The motion for a new trial is refused.—*Johnson, Nott, Richardson, Colcock*, Justices concurred.



JOHN RODGERS, *ads.* ISAAC NORTON.

Free persons of color are entitled to the benefit of. "the Prison Bounds Act."

THIS was a rule on the Clerk, to shew cause why he did not admit to the benefit of the *Prisons Bounds Act*, Isaac Norton.

The Clerk shewed for cause "that the said Isaac Norton was a free man of color, and therefore not entitled to the benefit of that act." The rule was made absolute by the Circuit Court. From that decision an appeal was submitted to this Court.

The opinion of the Court was delivered by Mr. Justice Huger.

The act of 1788, for establishing the bounds of the Prisons, &c. declares, "Whereas humanity requires that the confinement of persons on civil process should be less rigorous: Be it enacted, that all prisoners on mesne process, in any civil

6 SOUTH-CAROLINA STATE REPORTS,

S. & I. JOHNSON, vs. JEREMIAH GAITHER.

action, &c. on complying with the requisitions contained in this act, shall be entitled, &c. to the rules." The words are very broad, "*Prisons and Prisoners*," and these are used throughout the act. No where are the words "*free white person*" employed. The act therefore does not exclude free persons of color: nor would it be just, after forcing them into Court, to withhold a privilege so important and which is granted to all others. The policy of the law appears to require no such discrimination.

The motion is refused.—*Johnson, Nott, Gantt, Richardson, Colcock*, Justices concurred.

S. & I. JOHNSON, vs. JEREMIAH GAITHER.

Defendant purchased corn of a widow who remained in possession of her deceased husband's effects, without having been appointed executrix or administratrix. It did not appear that he was apprized of her want of authority. Held that defendant was not liable, as executor de son tort.

THIS action was brought to charge the defendant as executor *de son tort*.

The plaintiff had obtained a judgment against Thomas Stewart, for eighty one dollars, in 1820. Not long afterwards Stewart died, leaving his widow on his farm, who continued in the undisturbed possession thereof for several months, when it appears the defendant purchased or got some corn from her, which he took away in his waggon, and credited the estate for the same, on a note due him by Stewart. There was no evidence of the widow having been appointed administratrix, or having been left executrix. The Circuit Court being of opinion that the defendant was not an executor *de son tort*, gave a decree against the plaintiff. A motion was submitted to reverse that decision.

The opinion of the Court was delivered by Mr. Justice Huger.

A very slight interference with an estate will make a stranger an executor *de son tort*. (*Toller's Law of Executors.*) It is important to those who have business to transact with an estate,

JAMES MALCOMSON, vs. SHERARD JAMES.

to know who is authorized to act for it, without the necessity of resorting to the Ordinary's office. He who does that which the executor alone is authorized to perform, holds himself out as executor, and has no right to complain that he is so regarded: nor would it be just to permit him to throw off his assumed character at pleasure, (12 Mo. 471. 2 Black. Com. 507.) Besides, an executor may, before probate, perform every act which is incidental to the office. (*Toller's Law of Executors*, 45.) A stranger therefore, who sees one acting as executor, may fairly presume that there is a will, in which he is appointed executor. A stranger is not bound to enquire into an executor's title; if there be an appearance of it, it is sufficient. In the case before the court, the widow had been in possession of the plantation for months before the defendant got the corn: he and all the world had a right to regard her as an executrix; and if there has been no will, and no administration has been granted, she is *executrix de son tort*. There is no evidence that the defendant knew she was not executrix. All that has been shewn is, that he knew what every one in the neighborhood must have known, that the plantation on which she lived, had been her husband's and was a part of his estate. And had he known she was not executrix, as there is no evidence of his having been instrumental in causing her to assume that character originally, he cannot be regarded as a co-executor.

The motion is refused.—*Johnson, Nott, Richardson, Colcock*, Justices concurred.

JAMES MALCOMSON, vs. SHERARD JAMES, *Administrator of Edward Ferrell*.

Motion to set aside a judgment, on an affidavit of Defendant's Attorney, that Plaintiff had consented to take it, subject to the plea of plene administravit, or plene administravit præter; no such agreement appearing in writing or on the record: to which Plaintiff offered a counter affidavit. The Court refused to receive the affidavits, and motion refused.

This was an action of debt, on a judgment entered up in 1822. To defeat the action, the Defendant moved to set aside

JAMES MALCOMSON, vs. SHERARD JAMES.

the judgment, on the ground that when it was obtained, the Plaintiff consented to take it subject to the plea of *plene administravit* or *plene administravit prater*. This fact, or agreement, was not however entered upon the record. An affidavit was offered to shew that the judgment had been improperly entered up by a Clerk, in the absence of the Attorney, on professional business. The plaintiff's counsel offered to produce an affidavit, on the part of Plaintiff, that no such agreement had been made. The Circuit Court refused the motion. An appeal from that decision was submitted to this Court.

The opinion of the Court was delivered by Mr. Justice Huger.

In this case, it is contended that, in addition to the general issue apparent on the record, the plea of *plene administravit* was understood between the parties, to have been filed: and that therefore the judgment ought to be set aside. Of this understanding there is no other evidence than the averment on oath of one of the attorneys employed in the original suit; and this is denied by the Plaintiff in the action. If the judgments of this Court are to be set aside thus informally, it is difficult to foresee to what lengths the Court may not be carried; or when pleadings in any case are to be regarded as complete. The rules of Court require all pleas to be regularly filed. The 6th rule declares, that no plea of *plene administravit* shall be admitted in any action against an Executor or Administrator, unless the Defendant pleading such plea, do file with the same, in the Clerk's office, a full and particular account of his administration, upon oath, with an office copy of the inventory and appraisement of the estate; and in this case no account, inventory or appraisement has been filed.

The Court is therefore now called upon to disregard these rules, and to open a judgment, on the ground that the plea of *plene administravit* had been orally pleaded; and which ought to have been noticed in the judgment. I am unwilling to countenance so great an innovation; although I cannot doubt the statement made by the respectable counsel whose affidavit has been submitted in this case. It must be apparent to all, how painful would be the duty of the Court, if it were obliged to decide between contradictory assertions or affidavits of respec-

VOLENTINE, vs. BLADEN.

table members of the bar, as to the pleas that were understood by each to have been filed, in their respective cases. To avoid this, the pleas must be regularly filed, and no agreement, not in writing, can be regarded by the Court as binding, unless the parties consent thereto.

The motion is dismissed.—*Johnson, Nott, Richardson, Colcock*, Justices concurred.

RHODY VOLENTINE, vs. JOHN BLADEN.

A mother is entitled to recover, on a written contract made with her for that purpose, wages due for the labor of her infant son.

THIS was an action of assumpsit, brought by the plaintiff against the defendant, founded on a written contract, whereby the plaintiff agreed to put her son, Wiley, to work with the defendant for one year: "That the said Wiley was to work as a constant hand in the field, according to the directions of the defendant, and receive one-third of the cotton and one-fourth of the grain, &c. for his services." The plaintiff proved that her son, Wiley, worked with the defendant from January until June. The defendant's council moved for a nonsuit, on the ground, that according to the legal effect of the written contract, the plaintiff was not interested; in as much as the same was made for the benefit of her son, Wiley, and he was the only person that could sustain any injury for a breach of the contract.

The presiding Judge over ruled the motion, and the case went to the Jury, who found a verdict for the plaintiff, from which the defendant appealed on the ground taken on the Circuit.

The opinion of the Court was delivered by Mr. Justice Gantt.

The plaintiff in this case hired her son (a boy under age) to the defendant for one year. He remained from January until June, when for some cause the boy left the service of the defendant.

This action was brought by the mother, to recover the value of her son's services for the time he remained.

HOUSTON, vs. FRAZIER.

I see nothing in the contract which tends to impair the correctness of the construction given to it by the presiding Judge. The contract was made with the mother and for her benefit; consequently she might rightfully and legally recover the wages secured to be paid by the contract, which the defendant had entered into with her.

The nonsuit moved for, is refused.—*Richardson, Johnson, Colcock*, Justices concurred.

MATHEW HOUSTON, vs. ISAAC FRAZIER.

Note of hand after due, endorsed 1st November, 1819. At the time of endorsement, endorser informed that immediate demand would not be made of drawer; and promised himself to write to drawer and inform him. Demand made of drawer, residing in Georgia, about 10th December. Held that demand was made in sufficient time. Indulgence given to drawer after demand, on his promise to pay; and suit afterwards brought against him. Notice of non-payment given to endorser, March, 1820. Held that endorser was discharged on account of the credit given to drawer, and for laches in giving notice to endorser. No sufficient evidence of a promise to pay, after notice of dishonor; which must be explicit and clearly proved.

THIS was an action by the plaintiff, as survivor of the firm of Gillispie & Houston, against the defendant as endorser of a note.

The note was drawn by Wilson Conner, on the 18th of October, 1816, in favor of Isaac Frazier, the defendant, or order, and payable on the 1st day of January, 1818. On the 1st day of November, 1819, Frazier endorsed the note, for value received, to Gillispie & Houston. The evidence produced on the trial of this case established the following facts:

Mathew C. Houston, examined under a commission for that purpose, deposed, "That Wilson Conner, in the year 1819, resided in Montgomery county, in the state of Georgia, about two days ride from Milledgeville; that he, the witness, had been informed by Frazier, the defendant, that he was brother-in-law, or a relation by marriage, to Conner.

HOUSTON, vs. FRAZIER.

The witness believed he had seen the note in question, at or near the time of the endorsement. That Gillispie & Houston gave for the note several mules and a horse. That in the month of December, near the tenth, the witness presented the note to Wilson Conner, in Milledgeville, and demanded payment of the same. That Conner did not pay the note, but said that he had some cotton, unsold, at home, and that as soon as he returned, he would make the money out of it, and pay the note to *any person that the witness might appoint*: for which purpose, the witness put *the note in the hands of Thaddeus G. Holt, and informed him of the same*. That in the month of March, 1820, in the town of Columbia, S. C. the witness informed the defendant of the demand, and failure of payment, and that he (the witness) had directed a suit to be brought at the next court; that Frazier said it was right, and that he would see that his property brought the money." The witness testified further, that he believed that a suit had been brought, at the next court after the demand made for payment, and as far as he knew, all due exertions were used. On the question, whether Wilson Conner was insolvent in 1819? The witness answered—"He did not know. Conner," he said, "was a member of the legislature, sitting at the time the demand was made, and witness was informed, that he had to take an oath that he was worth five hundred dollars, before he was entitled to a seat. That he, the witness, in his transactions respecting this note, acted as the agent of Gillispie & Houston. That Gillispie died in October, 1821. That the reason why a demand was not sooner made was, that the business which he was on, called him to Charleston, and that Frazier said he would write to Conner, so that he might be ready to take up the note when the application should be made."

On the cross-examination, the witness said, that the endorsement on the note was made at the time it bears date; that the length of time between the endorsement and the demand of payment, was from thirty to forty days, of which intended delay Frazier was informed at the time of the endorsement.

On being asked, what length of time intervened between the demand of payment and the notice to Frazier of non-payment, he answered that "he did not know that Frazier had

HOUSTON, vs. FRAZIER.

any certain notice until March, 1820, about three or four months." In addition to the foregoing testimony, was an exemplification of a record, setting forth proceedings of a suit, in the Superior Court of Montgomery county, in the state of Georgia, upon the note now in question; wherein Isaac Frazier, who sued for the use of Gillispie & Houston, was plaintiff, and Wilson Conner, defendant. In that suit, the defendant confessed a judgment for five hundred and fifty dollars, with interest. The judgment was duly entered up, and a fi. fa. issued, returnable on the third Monday of March, 1821. On this execution a levy was marked, as having been made on the 15th and 18th January, 1823. On the 21st March, 1821, there was paid to the plaintiff's attorney, by the sheriff, on this execution, twenty-eight dollars twelve and a half cents; and on the 19th of September following, the further sum of thirty-six dollars and fifty cents, making in all, sixty-four dollars sixty-two and a half cents; after which the sheriff returned nulla bona.

On the trial of this action, the defendant relied upon the laches of the plaintiff, in not having given due notice of the non-payment by the maker, and thereby exonerating the endorser from all liability.

The Jury were instructed, in the charge of the presiding Judge, upon the law in relation to the degree of diligence required on the part of the holder, where there had been a failure of payment; and he expressed a very clear and decided opinion that the notice furnished in this case, after a lapse of three months, would occasion the loss to devolve upon the holder; unless the jury might suppose from the evidence furnished, that Frazier had waived the necessity of notice at the time the note was endorsed, or that his conversation with Houston, the agent, at the time the notice was given, amounted to a waiver of this right, and a promise to pay the note himself. The jury found a verdict for the plaintiff for the amount of the note and interest, from which an appeal was claimed on the following grounds:

1st. Because the defendant had no notice of the non-payment of the note for upwards of three months from the demand of payment and refusal to pay of the maker.

2d. Because it appears defendant had cotton in his hands, which might have been obtained, if proper steps had been

HOUSTON, vs. FRAZIER.

resorted to by the plaintiff, from whose neglect it is to be presumed indulgence was given to the maker of the note, which discharges the endorser.

A third ground was taken, but, in substance, the same as the first.

The opinion of the Court was delivered by Mr. Justice Gantt.

No principle in the law is more clear or better settled, than that the endorsee of a note of hand, after demand of payment of the maker, who refuses or omits to pay the same, must, within a reasonable time, give notice of such refusal or neglect, otherwise the endorser will be discharged. I will not multiply authorities in support of a position which is so familiar with the profession; but advert to one case only, by way of illustration and analogy: I allude to the case of *Anderson, vs. George*, (a) tried before Lord Mansfield, chief justice. The action was against the defendant, as endorser of the note. George, the payee of the note, had endorsed it in payment to the plaintiff: it became due 2d May, and on the 5th May, the plaintiff's banker (after three days grace) demanded it of Hopley, the maker. Hopley desired two or three days to pay it in, and so from time to time, which were given him till 13th May, when he told the banker he could not pay it. On the 14th, Hopley failed, and became a bankrupt. On plaintiff's applying to George for payment, George told him he should have applied before, on Hopley's first refusal, and that he now did not think himself liable to pay it: whereupon the action was brought. Lord Mansfield—"The question is, who is to bear the loss, as Hopley, the drawer has failed. The banker, who has the note in his hands, and who in this case, being the plaintiff's agent, is to be considered as one and the same person with the plaintiff, comes on the 5th, and demands payment: the banker gives Hopley indulgence to pay it from the 5th to the 13th, without giving any notice to the endorser; which if he had done, it would have urged the endorser to get his money. Here is no neglect of application. The case is still stronger; here is an actual credit given for eight days, and the question is

(a) Solwyn's N. Pri. 404.

HOUSTON, vs. FRAZIER.

who gave the credit. The loss (though this is a hard case) ought to be borne by the person who gave the credit." Verdict was given for the defendant.

Apply the circumstances of the case quoted, to the one before us. Houston, the agent of the plaintiff, on the 10th December, 1819, presented the note to the drawer for payment; the note was not paid, but Conner said, that he had at home unsold cotton, which on his return he would apply to the payment of the note, in the hands of any one the agent might appoint. On this promise made by Conner, the agent placed the note in the hands of Thadeus G. Holt, and at the same time informed Holt of what Conner had promised. From that time till March, 1820, a period of three months and upwards, no notice is given to Frazier.

That the agent relied upon the assurance of payment given by Conner, is evident, from the information which he gave to Holt, at the time the note was placed in his hands. His meaning fairly interpreted, is this, "I have demanded of Mr. Conner, payment of this note in Milledgeville, where he is attending as a member of the legislature. He was not then in a situation to pay it, but he has requested indulgence until his return home, where he has on hand a parcel of cotton. He has given me an assurance that he will pay the proceeds of the sale of this cotton into the hands of any person whom I may appoint, in discharge of the note: take his note therefore and collect in my behalf, the amount called for by it on Conner's return home, and sale of the cotton." I think no other correct interpretation can be given to this evidence; and it shews most evidently that the agent of the plaintiff did rely on Conner's promise; that he did indulge and trust him for the fulfilment of it, from the 10th Dec. 1819, (the time when the demand of payment was made) up to the 10th February, 1820, when a suit was instituted against Conner, upon the note. The principle therefore, upon which the case of Anderson and George seems to have been settled, that when the holder gives a credit to the maker, the endorser is discharged, will apply with redoubled force in the present case, where the credit given by the holder to the maker, was extended to a period of time far beyond what was allowed in that case. Independently however, of the defendant's exonera-

HOUSTON, vs. FRAZIER.

tion from liability, by reason of the credit given by the agent, it is equally clear that the degree of diligence which the law contemplates, in respect to notice of non-payment to the endorser, where he is intended to be made liable, has not been fulfilled on the part of the present plaintiff.

From the evidence disclosed by the trial, it was understood by the contracting parties that there would be a delay in the demand of payment, for the space which intervened between the time of making the endorsement and the demand which was made; but the evidence discloses nothing which can be interpreted into an agreement on the part of Frazier, that he would dispense with notice of non-payment. The reason of the rule which requires this notice is obvious, that the person intended to be charged by the default made, may look after his interest and not have it compromised by any neglect of the holder, whose business and duty it is to give the earliest notice of the default. Insolvency itself, in the maker, will not supercede the necessity of notice of non-payment. It constitutes the condition, *sine qua non* of recovery against the endorser; for in an action of this nature, it is legally necessary that notice of default or refusal to pay, should be alleged to have been given to the endorser, in reasonable time, and must be proved on the trial. Where notice might have been given in four days and less, a delay of three months and upwards, is such laches on the part of the holder, as would clearly fix him with the loss; unless indeed, the endorser has waived the necessity of notice: which brings me to that part of the evidence relied upon by the plaintiff, and noticed in the charge of the presiding Judge, to the Jury.

Houston, the witness, testified that when he gave notice to Frazier, in March, 1820, of the demand and failure to pay, and that he had directed a suit to be brought, &c. Frazier replied, that it was right, and that he would see that his property, (meaning, I suppose, Conner's, the maker,) brought the money.

In what light are we to view these expressions, on the part of Frazier? If they can be fairly construed into a promise to pay the note, or a guarantee that the note should be paid after a disclosure having been made by the agent of all that had taken place; or if, indeed, this evidence, *per se*, is sufficient to shew

HOUSTON, *vs.* FRAZIER.

that, at the time the note was endorsed, it was understood that Frazier was to dispense with the legal requisite of reasonable notice of non-payment, as well as that of demand on the maker, which last he certainly waived at the time of the endorsement, then his responsibility would be fixed, and the verdict of the jury correct.

I cannot, however, consistently with any correct rule of construction, put so enlarged an interpretation upon these expressions. Another and far different one may be given to them, which I will explain thus: "you, as agent of the plaintiff, after relying upon a promise of payment, on the part of the maker, and after having given credit to, and indulged him for such a length of time as exonerates me from liability, have done right to bring suit upon the note against the maker, who is alone legally bound to pay the amount: I will however, aid you with my endeavors, that his property shall bring the money." That these expressions on the part of Frazier, were no waiver of a right to notice of non payment, will be clearly seen by reference to the authorities quoted in Chitty on Bills, 308-523. Chitty himself says, the waiver by an *endorser*, must be explicit and made out by the most clear and unequivocal evidence. If an endorser, speaking of several bills, on different places, and under different circumstances, says, "he would take care of them," or "he would see them paid," this was held not sufficient evidence of a promise to pay one of the bills, on which no notice of non-acceptance had been given. *Miller vs. Hackley*, 5 *John. Rep.* 375. *Griffin vs. Goff*, 12 *John. Rep.* 423. Expressions of this kind are to be construed strictly, *May vs. Coffin*, 4 *Mass. Rep.* 341. In the last case, where there had been promise to pay, where due notice had not been given, it was held not binding, as being wholly without consideration, and especially, as he had retracted his promise a few days afterwards. So too, if an endorser, under ignorance of the law, or through mistake of the law, promise to pay a dishonored bill or note, he is not bound by such promise. 7 *Mass. Rep.* 449. In the expressions used by Frazier, there certainly was nothing like an express promise to pay, without which, it seems he could not legally be held liable. In the case before us, the note having been endorsed after it became due, Frazier's relationship with the drawer, his waiver

LESTER, ads. MARTIN. BATES, ads. MARTIN. WADSWORTH, ads. GRISWOLD.

of diligence, in respect to demand of payment; his after declaration that Houston had done right in bringing the suit, and his saying that he would see that Conner's property should bring the money. All these considerations, combined with the certainty that Frazier had received value for the note, together with the apparent injustice of applying a rigid technical rule to contracts not strictly of a mercantile character, may probably have produced this verdict. It is possible however, there may have been representations on the part of Frazier, in relation to this transaction, which may on a second trial produce the same result, of fixing him with the payment of this debt. But from the best view which I have been able to take of the evidence furnished on the trial, and from the law arising thereon, I entertain no doubt but that a new trial should be granted; which is the unanimous opinion of the court.

J. D. LESTER, ads. M. MARTIN, J. BATES ads. M. MARTIN.

Under the act of 1821, suggestions were filed against judgments, before confessed; which, on being called, were dismissed by the Judge of the Circuit Court. The defendants to the suggestions, thereupon, entered up judgments as of nonsuit, and issued executions for costs. These executions, on motion before a Judge at Chambers, were ordered to be set aside, and on appeal, it was held that the defendants were not entitled to costs.

TERTIUS WADSWORTH, vs. GILES GRISWOLD.

Defendant having lodged two notes of hand with an attorney for collection, by a separate writing, assigns them with other choses, in payment of a debt, and transfers the attorney's receipt for the notes, with an order written thereon, to pay the proceeds when collected, to the assignee. The plaintiff's attachment being afterwards issued and served on the attorney, as garnishee, it was held that the assignment was valid, and the monies collected not liable to the attachment.

THE defendant, Griswold, in the month of February, 1820, placed in the hands of John M. Felder, Esq. attorney at law, for collection, two notes of hand, drawn by William West,

WADSWORTH, *ads.* GRISWOLD.

in favor of said Griswold. Before any judgment had against West, or the monies collected, Griswold being indebted in a large amount, as is alledged, to one William H. Imlay, transferred by his attornies, A. Slaughter and C. Labuzan, a right to certain choses in action due him, in part satisfaction of his debt; a list whereof was made out, the notes of West being included. On the back of this list, was the following memorandum, in the hand writing of Griswold: "I have examined the within schedule of notes receipted for to William H. Imlay, by A. Slaughter and C. Labuzan, and which said notes they, as my attornies, assigned to the said Wm. H. Imlay; and which said act of my attornies, I hereby ratify and confirm:" signed, "Giles Griswold." On the back of the receipt also, given by Mr. Felder, at the time the notes in question were lodged with him for collection, is the following endorsement: "Pay over to William H. Imlay or order, the proceeds of the within claims; for value received, 14th April, 1821. *Giles Griswold, for*

A. Slaughter and C. Labuzan, attornies."

Wadsworth, the plaintiff, obtained a writ of attachment, which was lodged 28th October, 1822; a copy whereof was served on John M. Felder, the same day; to which he returned that the money was collected and ready to be paid over as the court should direct.

Whether under all these circumstances, the monies collected from West, and in the hands of Mr. Felder, were subject to the plaintiff's attachment, was the question. The presiding Judge did not think that the assignment and transfer to Imlay precluded Wadsworth from a recovery. The jury found accordingly, and the money was ordered to be paid over to the plaintiff.

An appeal from this decision was taken:

1st. Because there was such an assignment and transfer of the money collected from West, to Imlay, as to prevent its liability to Griswold's attachment.

2d. Because there was no property on which the attachment could operate.

The opinion of the Court was delivered by Mr. Justice Gantt.

Long before the attachment in this case was served upon the

WADSWORTH, *ads.* GRISWOLD.

garnishee, (but at what particular time does not appear) Griswold, by his authorized attorneys (A. Slaughter and C. Labuzan) amongst other choses in action, transferred to Imlay the notes in question.

Imlay being a creditor to a large amount, the transfer thus made was based upon a full and adequate consideration. In reference to this transaction and in confirmation of it, (if indeed any confirmation was necessary) was the order of Griswold himself, on the 14th April 1821, upon the back of Mr. Felder's receipt for the notes in question, directing that the proceeds of West's notes should be paid over to Imlay.

It is impossible to conceive therefore a more full and absolute relinquishment of right in one man and investiture in another, than what took place in this instance. Not the slightest imputation of fraud attaches to the transaction, by which its efficacy might be impaired; but on the contrary, the transfer appears to have been *bona fide*, and in part payment of a very large amount due from Griswold to Imlay. After the right of Griswold to those notes had been thus disposed of, Wadsworth, the plaintiff, on the 28th October, 1822, (eighteen months at least after Imlay's right to the proceeds of West's notes had been secured to him) took out his attachment. The attachment act can alone operate, by the express terms of it, upon the monies, goods, chattles, &c. of the absent debtor. If therefore the money in the hands of the attorney, did not belong to Griswold, the debtor, but to Imlay, then there was nothing on which it could operate.

The plaintiff, although a creditor, was entitled to no preference over Imlay; and the effect of the proceedings under this attachment (were they to be allowed) would be to divest a right fairly and legally established in Imlay, and to appropriate a sum of money belonging to him, to the payment of a debt due by Griswold.

This would be as unjust as it is illegal. The order therefore, which was made for the payment of the money in the hands of the garnishee to the plaintiff in attachment, is set aside, as also the verdict which was given in the case; the property attached not having been liable to the plaintiff's attachment.

Richardson, Huger, Johnson and Colcock—Justices, concurred.

RICHARD RICE, ads. SAMUEL SPEAR and JAMES GALBREATH.

W. H. residing in Virginia, by his will directs his negro slave, C. to be free after the expiration of his apprenticeship. To this the executors assent, the estate being, independently of this property, solvent; and C. is suffered to go at large as a freeman. C. is afterwards levied upon and sold, under a fi. fa. against the executors of W. H. Held that the sale was void and C. entitled to his freedom.

THIS action was instituted by the plaintiffs, as guardians of negro Charles, to establish his freedom, under the will of his former owner, Wm. Hutt, late of Westmoreland county, Virginia, deceased. The following is the clause in the will, "It is my will that negro boy Charles shall continue with James Piggott, for four years, to learn the tailor's trade, after which time he shall be free." His will bears date the 18th November, 1799. On the 23d of December, following, the will was admitted to probate and duly recorded. Samuel Templeman, the surviving executor under the will of Wm. Hutt, deposed, on his examination, that he was acquainted with the boy Charles, and by his evidence identified the ward of the plaintiffs as the same. He further testified, that he had every reason to believe that the estate of Wm. Hutt will be sufficient for the payment of all his debts; and the witness pointed out, very explicitly and satisfactorily, the reasons upon which his belief rested. That he had no claim, as executor, against the freedom of Charles: that as soon as he had qualified as executor, under the will of Wm. Hutt, to wit, on 4th Monday of December, 1799, he together with the other then executors considered Charles as free, so soon as his apprenticeship should expire. That soon after the death of Wm. Hutt, Piggott, the tailor, died; at whose death the negro Charles went about at large for several years in the county of Westmoreland, perfectly free and unrestrained by either of the executors, or any one else. That the executors had no claim upon him, nor did the witness ever hear of any claim set up by any one, until within a year or two last passed, by a Mr. Chandler, who claimed him, as the witness had been informed, as administrator of Wm. Rice, a former deputy sheriff of Westmoreland, who it was said, had bought him fifteen or twenty years ago at a sheriff's sale. The witness testifies, most expressly, that he, the witness, never consented to

RICE, *ads.* SPEAR & GALBREATH.

his being taken in execution and sold as a part of the estate of Wm. Hutt: that this negro was not inventoried as a part of the estate: that he then, and does now consider the said negro Charles entitled to freedom. On the part of the defendant, was adduced in evidence, the proceedings had in the County Court of Westmoreland, wherein John Crutcher was plaintiff, and the executors of Wm. Hutt defendants; wherein judgment by default was given and damages assessed to \$236 5 cents; the execution thereon issued, which was levied on negro man Charles, and the sale of the negro, by the sheriff, to Wm. C. Chandler, for \$23 68. Several witnesses were examined to shew that the defendant's title to the negro in question, had been regularly and correctly deduced from the sale thus made of Charles, considered as a part of the estate of William Hutt. The presiding Judge considered, that as Charles went at large as a freeman, by the assent of the executors, under the will of Wm. Hutt, and as the surviving executor had testified that he had no claim upon him, this assent on the part of the executors established the freedom of Charles; and that if this act, on the part of the executors, constituted a devastavit, they thereby made themselves personally responsible for the value of the negro. That the emancipation of Charles, by the will of Wm. Hutt, was in the nature of a legacy, and to be governed by the same rules; consequently that the sale of Charles, by the Sheriff of Westmoreland county, was void; he being at the time a freeman by the will of Wm. Hutt, and then at large by the assent of the executors. The jury found accordingly, with \$85 damages. The defendant appealed on the ground of misdirection by the Judge, as to the law of the case.

The opinion of the Court was delivered by Mr. Justice Gantt.

The important facts embraced in this case are, that the negro Charles was, by the will of Wm. Hutt, his former master, set free: That the executors in pursuance thereof, assented to his going at large: That he did so for years, and was considered a freeman: That he was not inventoried as a part of the estate: That the executors never did, nor does the surviving executor now consider him as composing a part of the estate: That the estate will be able to pay debts. Whether, under all these cir-

PRICE, *ads.* SPEAR & GALBREATH.

circumstances, Charles is to be considered a freeman, is the question? By the will, freedom was bestowed upon Charles, and the executors, by their assent, put him in possession of it. In principle, it is analogous to the payment of a legacy or the release of a debt on the part of the executors. Executors have that power, and if fairly exercised, no third person has a right to call the act in question.

Suppose the testator had, by a deed of manumission (and the will may be considered in that light) bona fide given freedom to Charles. Could the act have been avoided by creditors, after the lapse of time which intervened in this case? I should hold it impossible. There is something palpably irregular and wrong in seizing upon and selling this man under the execution, without a previous investigation of his claims under the will and the executors assent thereto.

It is a species of administration upon the supposed property of an estate, unknown to the law. The regular course would have been to have caused this man Charles to be included in the inventory; or by some act of the law, to have rendered him amenable to the demands of creditors, and this at the instance of the executors. But the executors had no agency in this transaction. The evidence of Mr. Templeman shews very satisfactorily, that the estate will be sufficient to pay the debts. Why should this creditor therefore have invaded the sanctuary of freedom, to come at his rights? I think that the verdict in this case is supported by law, and that it cannot be disturbed.

The motion is refused.—*Richardson and Johnson*, Justices, concurred.

I agree that there should be a new trial.—*C. J. Colcock*.

WILLIAM M. STEPHENSON, vs. SAMUEL HILLHOUSE.

Defendant, at his own instance, undertook to arrest a party, on a bail writ; being authorized by a special deputation for that purpose. He did so, in presence of plaintiff's agent, and afterwards suffered the party to escape, and neglected to retake him, though he might have done so. Held that defendant was liable to the same extent as the sheriff would have been, and was guilty of gross neglect.

THE facts set forth in the plaintiff's brief are as follow: That the plaintiff, by his agent, issued a bail writ against one Abner M'Dearmin: that, at the instance and request of the defendant, and by the consent of the agent of the plaintiff, the writ was placed in the defendant's hands to be executed; the sheriff having conferred no him a special deputation for that purpose; that the defendant, in the presence of the agent, arrested M'Dearmin, and suffered him to escape: that M'Dearmin remained for several days in the neighbourhood, and the defendant was requested by the agent to retake him, who refused, unless the agent would accompany him.

The presiding Judge, in his charge to the Jury, drew a distinction between the case of the sheriff, acting in a public capacity, and a private agent of the plaintiff; in which character, it was thought the defendant had acted; holding that a less degree of responsibility attached to the latter than the former.

The Jury found for the defendant.

A new trial was moved for on the following grounds:

1st. Because the defendant undertook for a reward to perform the duties of a public officer, was clothed with all the powers of that officer and is liable to the same extent:

2d. Because the rule laid down by the Judge, "that a bailee for hire is answerable for gross neglect only," is not law, and was calculated to mislead the jury:

3d. That the evidence of neglect was sufficient.

The opinion of the Court was delivered by Mr. Justice Gantt.

In every case, where one man undertakes to perform a duty for another, the obligation arising therefrom must necessarily be based upon the nature of the act to be done, and have reference to the special circumstances under which the party undertook to perform the act. In the case before us, had the defendant undertaken to serve this writ at the particular instance

STEPHENSON, vs. HILLHOUSE.

of the plaintiff's agent, who could not otherwise have had the writ executed, then the degree of diligence which might legally have been demanded of him, could have been no more than a fair exertion of his capacity. But the case is far different when the undertaking is sought by the defendant himself, and with a view to the emolument arising therefrom. In every such case, the principles of good faith, as well as law, require that the undertaker should use all the diligence and attention which might become necessary to the performance of his undertaking. In such a case, as Mr. Jones says, "He is neither to do any thing how minute soever by which his employer may sustain damage, nor omit any thing however inconsiderable which the nature of the act requires," and he adds that, "though the law exacts no impossible things, yet it may justly require that every man shall know his own strength before he undertakes to do an act, and that if he delude another by false pretensions to skill, he should be responsible for any injury that may be occasioned by such delusion." Now, apply this reasoning to the defendant in this action. He had been in the habit, it seems, of transacting business of this nature, with a view to the profits which would accrue. In this case he requested of the agent that he might be employed to serve the writ, in the character of a legalized officer. The agent of the plaintiff consented, and might well conceive, under such circumstances, that every exertion would be used to shew that the confidence thus reposed was worthily bestowed. There was no understanding between the agent and the defendant, that the former was to assist in the performance of the duty; and the defendant could not justify his refusal to act, upon the ground contended for, viz. that the agent would not go with him. The defendant undertook in this instance to discharge the duty of a sheriff in the case committed to him, and having violated his engagement, he is responsible to his employer, in like manner and to the same extent, that a sheriff would be under similar circumstances.

On the second ground taken in the brief, I will only remark, that from the judge's report of his charge, it would seem, that his observations to the jury were rather calculated to point out an existing discrimination in the law, between a public officer and a private agent, than to fix with precision the extent of

OWENS, vs. FORD.

responsibility which the latter might bring upon himself by the non-performance of his undertaking. But under the charge as stated, it is manifest that the defendant had been guilty of that gross neglect, which, in the opinion of the judge, would make a private agent responsible in damages; and this view of the case will supercede the necessity of making any comment on the third ground.

I am of opinion that a new trial should be granted.

We concur.—*Richardson, Johnson and Colcock.*

SOLOMON OWENS, vs. JESSE FORD.

A slave was sold, who had before committed burglary; the fact being unknown, both to seller and purchaser. After the sale, he was convicted, and his ears cropped. Held that the implied warranty did not extend to the loss of value thereby occasioned.

THE defendant set up, by way of discount, that the note on which the action was founded, was given for a negro: that the negro before the sale had committed a burglary, for which he was afterwards tried, convicted, and punished; by reason of which punishment, his ears being cropped, his value was greatly impaired. The fact of the commission of the offence was unknown to both parties at the time of the sale.

His honor charged the jury that the implied warranty did not extend to such case; and the jury found a verdict for the plaintiff, for the whole amount of the note. The defendant now moves for a new trial, because his honor erred in so charging the jury.

The opinion of the Court was delivered by Mr. Justice Richardson.

In the case of *Richard Smith, vs. M'Call*, (1 M'Cord, 230) this court has decided that there is no implied warranty of the moral qualities of a slave, arising from the mere sale and price paid; and that case appears to me to decide the one before us. For, if there is no warranty implied, against the vices of the slave, it would be inconsistent that there should be nevertheless, a warranty against the consequences of such vices. If such a distinction were allowed, that case would be frittered away; because then, every case of that class would be made to

VAUGHAN and M'LAUCHLIN, *ads.* DINKIN'S.

depend upon the contingency whether some evil had not followed from his vices, though there was no warranty against the vice itself. A door too, would be open to frequent frauds, if an injury to the slave, brought about by a conviction, were to be the test; in as much as such convictions might be readily had or procured. This decision, however, it will be perceived, does not touch the case where the seller knowing the crime of this slave, yet conceals it from the purchaser.

The motion is refused.—*Huger, Johnson, Nott, Colcock*, Justices, concurred.



WM. VAUGHAN and JOHN M'LAUCHLIN, *ads.* ASA DINKIN'S.

Action of debt on judgment: ordered for judgment and referred to clerk, May 1819. The judgment entered on his assessment set aside for the irregularity, May 1822: order for leave to enter upon judgment, nunc pro tunc, made by the Circuit Court, fall term 1823: Motion to set aside that order, to arrest the judgment, and for leave to plead payment puis darrein continuance, on the grounds of plaintiff's death before the making of the order, of defects in the declaration, and that the case was out of court for want of proceeding: Refused.

THIS was debt on judgment, which was referred to the clerk, at an extra court, May, 1819; who assessed the damages on 24th May, 1819, at \$ 98 39; and stated the debt at \$ 378, 17. Judgment was signed on 21st. June, 1820. The Constitutional Court set aside this judgment, in May term, 1822; because the reference to the clerk was irregular. At fall term, 1823, a motion was made to the Circuit Court, to enter up judgment, *nunc pro tunc*. The defendants objected upon all the grounds stated below; but they were overruled. Defendants then asked leave to plead payment *puis darrein continuance*; which was refused.

A motion was now made to set aside the order granting leave to enter up judgment *nunc pro tunc*; and in arrest of judgment; and for leave to plead payment, *puis darrein continuance*.

1st. Because the plaintiff was dead when leave was given to enter up judgment:

VAUGHAN and M'LAUCHLIN, *ads.* DINKINS.

2nd. Because the declaration is essentially defective, and no judgment can be entered upon it:

3d. Because the declaration is upon a bond, or a judgment; but upon which, does not appear:

4th. Because the court refused to permit a plea of payment, *puis darrein continuance*, to be put in; before leave to enter judgment *nunc pro tunc* was granted:

5th. Because the case was out of court; the last proceeding had upon it, having taken place in May, 1819; and therefore no order could be made up on it, unless the regular steps were taken to revive the proceedings.

The opinion of the Court was delivered by Mr. Justice Richardson.

In this case, the plaintiff having an order for judgment, in May, 1819, had the case erroneously referred to the clerk, to assess the damages; which being an act simply void, left the case precisely where it stood before, i. e. under an order for judgment; and just as if it had remained on docket up to October, 1823. What then remained to be done, but to move for leave to enter up judgment *now*, as tho' it had been done in 1819, when it ought to have been done. It is pretended that judgment cannot be entered up at the end of three or four years after obtaining it. This is not uncommon. The entire object is to enter the form of a judgment, which had been rendered in 1819. It is entered *nunc pro tunc*; i. e. now, for May, 1819; and thus a proper formula of a judgment is substituted for the erroneous assessment by the clerk. It is urged that the plaintiff is dead; but his death is the reason why the judgment must be entered up *nunc pro tunc*; which renders the record consistent, and places the case in *statu quo ante mortem*. It is further insisted that the defendants should be allowed to plead payment *puis darrein continuance*; but there being only one party alive, no contestation can now come before the court, and an order for judgment having been taken, there can be no subject for pleadings in this case. The suit terminated in 1819; and so continues inert and inactive, until there shall be an offer to revive it, by writ of debt or scire facias; when the defendant may plead as he shall deem proper. The mistake is in supposing the case still before the court, open, and still in paper; when, in fact, it has terminated,

GIBSON, *ads.* CHAPPELL.

and will require a new writ; upon the issuing of which, the defendants may plead whatever has occurred since the order for judgment in 1819, and will then have the benefit of the defence they would now set up by their plea.

Lastly. It is insisted that the declaration is radically defective; but after an order for judgment, this court will not look astutely into the form of a count. It is enough that it appears to be bottomed very intelligibly upon a judgment of record, and being so, the rule is so to construe it, *ut res magis valeat quam pereat*.

The motion is therefore discharged. We concur.—Grant, Johnson, Nott, Colcock.



STEPHEN GIBSON, *ads.* LABAN CHAPPELL.

Grant to A. of two hundred acres; not including an adjoining portion of land, which was in dispute in this case. Conveyance to defendant; of one hundred and sixty acres, part of A's grant, in 1800; but so describing its boundaries as to include the disputed land. Defendant had been in possession, within the lines of A's grant, twenty five years, and the person under whom he claimed, since 1794. Land in dispute granted to plaintiff in 1819. Held that defendant's possession could not be extended, by construction, to the land in dispute; the conveyance to him, restricting his claim to A's grant, though erroneously describing its boundaries; and consequently, that no presumption could arise of a grant of the disputed land, to him, from the state.

THIS was an action of trespass, to try title. A tract of land, adjoining the land in dispute in this case, had been in the possession of the defendant and the person under whom he claimed, from the year 1794; by virtue of a grant of two hundred acres to W. Ackery. Defendant had been in the uninterrupted possession of it, for about twenty five years, under a Jacob Curry, and by virtue of conveyance from the said Jacob Curry, from the 21st January, 1800. This deed of conveyance, from Curry, to defendant, described the land as consisting of one hundred and sixty acres, being a part of a tract of land originally granted to Wm. Ackery, for two hundred acres; lying on

GIBSON, *ads.* CHAPPELL.

the south side of Little river. The grant called for Little river, as one of its boundaries, except a short distance from its N. W. line to the river, leaving a few acres between this line and the river. But the conveyance from Curry, to defendant, included this land, which was the part in dispute, as did also the younger grant to the plaintiff, dated 1819; so that the only dispute between the parties, was about the land lying between this short line of the Ackery grant and the river. The plaintiff contended, that it was vacant at the time of his grant; and the defendant, that if it was not included in the Ackery grant, yet the jury ought, from the length of time which defendant, and the person under whom he claimed, had been in the possession of the land, under legal conveyances, to presume a grant for it from the state. The court charged the jury to find for the plaintiff; and stated to them that the line contended for by the plaintiff, was the correct location of the Ackery grant, and as the defendant had never been in the possession over this line, they could not presume a grant in his favor, from the state. The jury found a verdict for the plaintiff. The defendant moves the Constitutional Court for a new trial, upon the ground:

That the court mistook the law, in charging jury that they could not presume a grant to the defendant, in as much as the defendant had never been in possession of the land, over the disputed line.

The opinion of the Court was delivered by Mr. Justice Richardson.

In this case, the plaintiff located the land in question, within his grant of 1819; and it was evident that the land was not covered by the grant to Ackery, under which the defendant claimed.

The motion, therefore, was resolved into the single enquiry, whether there was reason to presume another grant than the one to Ackery, in order to take the land out of the state, prior to 1819. For, although the defendant had been long in possession of the land contained within the grant to Ackery; yet, he had never taken actual possession of the land in dispute, until within a few years. When he was sued by the plaintiff, he had only possession of the land contained within the grant to Ackery, which cannot be extended by construction, to land without the

GIBSON, *ads.* CHAPPELL.

grant, and which had never been occupied by the defendant. This is clear, otherwise there could be no limits to constructive possession.

But it was urged, that, in as much as the mesne conveyance from Curry, to the defendant, sets forth the land in dispute, as coming within the limits of the tract conveyed; therefore, the actual possession of a part of the tract might be extended by construction, to the limits to set forth in the mesne conveyance; and thence, another grant from the state be presumed, for so much of the land as lay within the grant to Ackery; and assuredly, if this were all, such a presumption might arise: but it is always to be borne in mind, that the conveyance from Curry to the defendant, although it extends the tract by a mistaken description, yet describes the hundred and sixty acres conveyed, as a piece and part of the two hundred acres granted to Ackery; and thereby excludes the presumption, that this mesne conveyance could have been deduced from, or the possession under it, authorized by any other grant than that of two hundred acres to Ackery.

As the moment you fix the boundaries of the grant to Ackery, no intermediate conveyance under it could give title to lands beyond such boundaries, so the moment it appeared that this conveyance professed upon its face to release a part of the two hundred acres granted to Ackery, it as plainly excluded the presumption of any other grant, from which its descent could be traced, or the constructive possession enure to make a good title.

In a word, the actual possession of a part, required to be extended over the land in dispute, by means of the conveyance, in order to raise the presumption of another grant. But, that very conveyance, which is the sine qua non of the constructive possession, excludes the idea of such other grant, by referring the land conveyed to the individual grant of two hundred acres to Ackery.

And the defendant, being bound by the deed under which he held, and without which his possession could not be extended, by the very same deed, rebutted the presumption his counsel would enforce.

It is, in my judgment, as if a defendant were to set up a title by possession, and in order to define the limits of his possession, were to exhibit a lease for years; which, while it would,

LYLES, vs. A. BROWN and G. BROWN.

on the one hand, extend the constructive possession to the desired limits, would, on the other hand, exclude the presumption that the possession was adverse, and so defeat the ultimate object for which it was introduced.

From all therefore, that appears, the land in dispute was vacant in 1819, when the plaintiff's grant was obtained.

The motion is refused.—Huger, Johnson, Colcock, Justices, concurred.

E. LYLES, ordinary, vs. ANNA BROWN, administratrix of GEO. BROWN.

In a suit upon an Administration Bond, against the sureties of an Administrator, the Court will not look into the grounds or regularity of the proceedings, upon which the ordinary founded a decree of a sum of money due by the Administrator.

THIS was an action brought on an Administration Bond, given by Sarah Humphries, Administratrix of T. Humphries, with George Brown and another, sureties. The defendants are the administrators of George Brown, deceased. They pleaded performance; also, that the administration to Sarah Humphries, had been revoked and new administration granted to Thomas Humphries.

It appeared in evidence, that the defendants had been cited to account before the ordinary, for the actings and doings of the Administratrix, S. Humphries, and the ordinary made his decretal order against the Administratrix, on their default. It did not appear in evidence, that Sarah Humphries had been cited, and no satisfactory account could be given whether she was dead or removed from the district, at the time of the trial. It also appeared that Thomas Humphries, some time after the Administration had been granted to Sarah Humphries, gave bond and security to the ordinary, to administer the same estate; and the ordinary founded his decree on a receipt for money, given by Sarah Humphries to Thomas Humphries, Administrator of Charles Humphries, deceased.

The Jury, under the direction of the Court, found a ver-

LYLES, *ordinary*, vs. BROWN.

dict for the plaintiff, to the amount of the ordinary's decree, and interest from the date thereof.

The defendants now moved the Court for a non suit, which was refused in the Court below.

Because, the administratrix, Sarah Humphries, was not in any way cited to appear before the ordinary to account, before the commencement of this suit.

And if this motion should fail, then for a new trial;

Because, it appeared from the records in the ordinary's office, that the receipt on which the decree of the ordinary was predicated, had been given by Sarah Humphries to Thomas Humphries, Administrator of Charles Humphries, and that she received the money in her personal and not in her representative character.

The opinion of the Court was delivered by Mr. Justice Richardson.

The essential facts in this case are, that the defendants, being the administrators of George Brown, who had been the surety of Sarah Humphries, (the administratrix) having been cited before the ordinary, to give an account of her administration, the judge, after a judicial hearing, decreed the sum of one hundred and fifty dollars to be due by the said Sarah Humphries.

And the true question is, whether the Circuit Court ought to have regarded the charge of irregularity in the proceedings before the ordinary, or that of the want of sufficient evidence before him, as matter to invalidate the decree.

It is not pretended that the ordinary went beyond his jurisdiction; and we are not at liberty to enquire into the justice or injustice of the judgment of a court of competent jurisdiction; at least, when introduced collaterally, or as evidence. Such judgments being final and conclusive between the parties, can be revived only by direct appeal, or writ of error. Any other rule would indeed be productive of endless uncertainty, and render the judgment of a court, instead of the end, the mere beginning of litigation. *Stark, vs. Woodward*, 1 Nott & M'Cord, 329; and *Brown, vs. Gibson*, 326; 11th State Tri. 261. In addition to a principle so well established, this court has decided, in the case of the ordinary, vs. Williams and Parkman, 1 Nott & M'Cord, 587, that before the principal or sureties can be

BARNES, & Co. vs. SHELTON.

sued in an administration bond, they must first have been cited before the ordinary, and his decree made. Now, for what purpose is this preliminary suit before the ordinary required, if not to settle the amount due by the administrator? But to send the parties there, in order to account, and then to investigate the same subject here, would render that decision absurd, and would introduce indirectly, the practice of calling administrators to account in this court; to avoid which, and to keep them, as well as executors, before the proper tribunal, was the very object of that decision.

There is therefore, no ground for either motion, and the decree of the ordinary having been acquiesced in at the time, is conclusive, and both motions are dismissed.

Huger, Johnson, Nott, Colcock, Justices concurred.



PHILIP BARNES & Co. vs. SAMUEL W. SHELTON.

Note of hand given for two clocks. In a suit on the note, parol evidence offered to shew an agreement that one of the clocks might be returned if disapproved of: Held that this evidence was admissible, as establishing a set off, and did not go to alter the terms of the note.

THIS was an action of assumpsit brought on a note drawn by the defendant, in favor of the plaintiffs, dated 9th Dec. 1819. It was admitted that the note was given for two patent clocks. The defendant offered the evidence of P. P. Taylor, to prove that the contract was conditional, i. e. that if the defendant's father did not like one of the clocks, the plaintiffs were to take it back. The counsel for the plaintiffs objected to the testimony of Mr. Taylor, in as much as it went to establish a condition to the note, in contradiction to the face of it, and in violation of the statute of frauds. The objection was overruled, and the evidence went to the jury. Mr. Shelton Sims, the administrator of defendant's father, proved, that after his death, in the fall of 1820, he informed the plaintiffs that he should not consider the clock as part of the estate. The presiding judge charged the jury, that if they believed that there was a conditional contract, to find for defendant. The jury found for de-

BARNES, & Co. vs. SHELTON.

defendant; from which the plaintiffs appealed, and moved the Constitutional Court for a new trial on the following grounds:

1st. Because the evidence of P. P. Taylor and Shelton Sims was inadmissible and should have been rejected.

2d. Because the charge of the presiding judge, on the evidence, was contrary to law.

If he should fail in the above motion, the plaintiffs moved the court for leave to take a non-suit.

The opinion of the Court was delivered by Mr. Justice Richardson.

The question in this case, was not, whether the terms of the note might be altered by parol evidence: *But whether the defendant had not a good defence, by way of discount against the note.* The consideration of the note was a clock, with the right to return the clock, if disapproved of by the defendant's father. Accordingly, the clock being disapproved of, an offer was made to return it. Let us suppose for a moment, that the defendant had paid for the clock; would he not have had a right of action for the price paid. Assuredly he would. "If the buyer, (*says Phillips, 2 Vol. 79,*) by the terms of the contract, has power to rescind the contract by his own act, &c. (as where, together with the warranty, there is a power given to the buyer to return the horse, within a certain time, and he accordingly offers to return it to the seller, who refuses to receive it) then the contract is determined by the single act of the buyer, and the buyer will be entitled to recover back the purchase money, in action for money had and received." (*Cowp. 818. 7 East, 274, Term 33; Doug. 23.*) But the moment it appears that, in such a case, the purchaser would have had a right of action to recover back the purchase money, it is equally evident, that he has a good defence, by way of set off, in a case where he has not paid the purchase money. In a word, he who has a cross-action has the right of discount against an action brought. The error is in supposing, that the evidence went to alter the terms of the note. But this is not its tendency; it was to set off against the note, a return of the clock as authorised by the contract, which is equal to a total failure; precisely as if the clock, in the ordinary case of an implied warranty, had turned out wholly worthless. Although then,

ROBINSON, *ads.* CARWILE.

parol evidence could not be adduced to alter the note, yet a good defence arose, by reason of the contract which authorized the defendant to return the clock; which return being made, the consideration of the note had gone back into the hands of the vender, and the verdict followed for the defendant, upon an acknowledged principle, and in strict analogy to the common case of a total failure of consideration.

The motion is therefore refused.—*Gantt, Johnson, Nott, Colcock, Justices, concurred.*



HENRY ROBINSON, *and others, ads.* JOHN S. CARWILE.

Under the Prison Bounds Act, the commissioner of special bail, has only power to discharge, if no sufficient cause be shown for disbelieving the prisoner's oath or affirmation: if such cause be shown, he has no power to decide that the oath is false; nor can his finding to that effect, be given in evidence in a suit on the bond for the bounds.

THE plaintiff brought an action of debt, as Sheriff of Newberry District, against the defendants, on a bond given in conformity to the requisitions of the Act of Assembly of '88, commonly called the *Prison Bounds Act*.

Henry Robinson, one of the defendants in this case, had been arrested on the 23d February, 1821, by virtue of a Ca. Sa. at the suit of M'Creless and Duckett, and taken into the custody of the sheriff. On the 26th of February, the defendants, gave the bond in question, in order that the defendant Robinson might have the benefit of the rules and bounds of the gaol; agreeably to the provisions of the act above mentioned. Robinson, at the same time, filed with the clerk of the court, a schedule, on oath, of his effects, with a petition for his discharge. On hearing his petition, the commissioner of special bail refused to discharge him, and he was again taken into custody by the sheriff, but was discharged by M'Creless and Duckett, on the 20th April 1821. The plaintiff then brought this action on the bond, declaring generally for the penalty without setting forth a breach of the condition. The defendants cravedoyer of the condition of the bond and pleaded per-

ROBINSON, *ads.* CARWILE.

formance generally, to which the plaintiff replied specially, by setting forth particular articles of property, mentioned in the replication, as a part of Robinson's effects, and which were not surrendered up or contained in his schedule, and insisted upon this as a breach of the condition of the bond. Issue to the jury, was taken upon this replication.

On the trial of the cause, after proving the execution of the bond, the plaintiff offered as evidence the decision of the commissioner of special bail, rejecting Robinson's application for the benefit of the prison bounds act. But before this was offered, the court permitted the commissioner to amend his decision, by assigning his reasons.

The defendants objected to the reading of this decision as evidence, on the ground, that it was inadmissible and irrelevant to the issue. The objection was overruled and the evidence went to the jury. The plaintiff closed here, and the defendants moved for a non-suit on the following grounds:

1. Because the evidence offered by the plaintiff was insufficient to maintain the action.

2. Because the proof given by the plaintiff did not support his replication.—The motion for a non-suit was over-ruled.

The judge charged the jury, that the decision of the commissioner of special bail was conclusive, and that upon the evidence which had been given, the plaintiff was entitled to recover.

The jury accordingly found for the plaintiff the full amount of debt, interest and costs of the suit on which Robinson had been arrested.

The defendants appealed, and renewed their motion for a non-suit on the grounds above stated, and in the event of failing of success in this, moved for a new trial :

Because his honor mistook the law, in charging that the decision of the commissioner of special bail was conclusive evidence of a breach of the condition of the bond.

The opinion of the Court was delivered by Mr. Justice Richardson.

The finding of the commissioner of special bail was, that the defendant, J. C. Robinson, had not rendered a schedule of all his effects; which finding was held to be conclusive at the trial. And the true question is, was it competent for the commissioner so to decide.

ROBINSON, *ads.* CARWILE.

In a word, could the commissioner do more than leave the prisoner where he was found, upon a serious opposition being made to his taking the benefit of the prison bounds act.

The act, *P. L.* 456, after directing the manner, time, and notice required, before taking the benefit of the act, before the judge, justice, or commissioner, proceeds at the end of the 4th clause, "But if the plaintiff shall shew cause for disbelieving the prisoner's oath or affirmation, or shall desire further time for information, the judge, justice, or commissioner of special bail have power to remand the prisoner and appoint another day," &c. And if on the second day, "the plaintiff shall not appear, or shall be unable to prove that the prisoner's oath or affirmation ought to be disbelieved, the judge, justice, or commissioner of special bail, after assignment made as aforesaid, &c. shall discharge the prisoner."

Here we find that the prisoner is to be discharged, only when the plaintiff does not appear, or is unable to discredit the oath of the prisoner.

But if the plaintiff should appear, and can discredit the oath, as was the case in the instance before us, then no further power is given to the commissioner, and the prisoner of course remains in statue quo, i. e. within the bounds. The clause makes several modifications and alterations in the *Insolvent Debtor's Law*, of 1759; and we come to the 9th clause, upon which this case depends, and is in these words, "nor shall any prisoner be discharged, &c. "if," &c. But wherever a prisoner shall be accused, &c. "of fraud," &c. "it shall be lawful for the judge or justice, before whom the prisoner is brought, to direct a jury to be impannelled and sworn to determine the fact."

Here the enquiry again occurs, what power is given to the commissioner of special bail? None: he is not named in the clause; but dropping all notice of him, the clause directs that it shall be lawful for the judge or justice before whom the prisoner is brought, to direct a jury to be impannelled and sworn to try the charge of a false return, &c.

At all events then, the commissioner had no power to decide that the schedule was false. By the 4th clause, he has power to discharge, if the plaintiff cannot shew that the prisoner's oath ought to be disbelieved. But if this be shewn, the

GREY, *ads.* YOUNG.

commissioner is *functus officio*, and the case remains over to be tried by a judge, or judge and jury. It would indeed be a vast power conferred on a single commissioner of special bail, were he to decide finally upon the fate of the prisoner in a complex case of fraud, or upon important rights of creditors. No appeal being given, his decision would be conclusive, and his power greater in this respect than is allowed to the judge.

But it is enough to say that no such power being expressly given to him, he cannot take it by implication. The whole power given to the commissioner, appears then to be under the 4th clause, by which he may discharge the prisoner, provided he is not satisfied that the prisoner's oath ought to be disbelieved. If satisfied of this, his power ends, and the prisoner is given over to a higher tribunal. His office is to enquire, in the first instance, which, in nine cases out of ten, will eventuate in the discharge of the prisoner. But if he should meet with a serious charge of fraud, he is stopped.

This view renders the act of '88, an intelligible system, and although the 6th clause relates exclusively to insolvent debtors, yet it is evident that the 7th clause may relate to both the prison bounds acts, as well as to the insolvent debtors', and its provisions will apply to both acts.

The motion for a new trial is therefore granted.—*Gantt, Huger, Colcock, Justices, concurred.*

SIMON P. GREY, *ads.* THOMAS YOUNG.

After pleading to the merits, it is too late to set aside proceedings in attachment, on the ground that the bond entered into by plaintiff, on the issuing of the writ, does not conform to the directions of the Attachment Act.

The court has no power to discharge the bail in a civil action, in order to render him a competent witness.

In an action for the breach of warranty of the soundness of a slave, the declarations of the slave, by which disease was detected, were held admissible evidence; as inducement, and from the necessity of the case.

THIS was an action of covenant, for the breach of the warranty of soundness of a female negro slave, sold by the defendant to the plaintiff.

GREY, *ads.* YOUNG.

The proceedings were by process of attachment, on which some property of the defendant's, who lived in the state of Alabama, had been attached. The property was replevied by the agent of the defendant, and bail to the action was put in, according to the act of assembly, and the defendant came in and pleaded to the action.

The damages laid in the writ were ten thousand dollars, and the bond entered into by the plaintiff, was for only seven hundred; and before the cause was gone into, the defendant moved to set aside the whole proceedings, on the ground, that the bond was not in double the amount sued for, as required by the Attachment Act. The presiding judge being of the opinion that the objection came too late, after a plea to the merits, overruled the motion.

In developing the unsoundness of the negro, complained of by the plaintiff, it was objected on the part of the defendant, that the plaintiff ought not to be allowed to give in evidence any declaration of the negro, marking the character of the disease, as for instance, that she complained of a pain in her side. The court overruled the objection, and permitted the evidence to go to the jury.

In the progress of the case, the defendant offered to swear Benj. H. Gray, as a witness, and it was objected that he was incompetent, because he was defendant's bail. The defendant then moved for an order to have him discharged, by the substitution of other bail, with a view to render him competent. The court thought it had no power over the subject, and refused to give the order.

The motion to set aside the proceedings, on the grounds taken in the court below, was renewed on appeal; and if this motion should fail, a motion was made for a new trial, on the following grounds:

1st. Because the presiding judge refused to discharge B. H. Gray, the bail, to render him a competent witness for the def't.

2d. Because the presiding judge suffered the declarations of the slave to be given in evidence.

3d. Because the verdict is contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice Johnson.

GREY, *ads.* YOUNG.

There is no doubt that the motion to set aside the proceedings in this case, would have availed the defendant, if it had been made at a proper time, and under the circumstances which existed at the issuing of the writ. The act on which this proceeding is founded, requires that the plaintiff shall give a bond in double the amount sued for, to prosecute his attachment to effect: and the case of *Hughes, vs. Thomas*, decided by this court, is decisive on the point, that the damages laid in the writ is the sum sued for; and the bond ought to be in double that amount. But it is equally clear, that the motion comes too late after appearance and plea to the merits.

The general rule is, that, by appearing and pleading to the action, the defendant waives all exceptions to the form or regularity of the writ. *1st Constitutional decisions*, 104; *Smith, vs. Allston*: *Vance vs. Findly*, *1st Nott and M^c Cord*, 578.—3 *Cranch*, 496. *2d Nott and M^c Cord*, 64, 439.

The writ of attachment, although a sort of proceeding in rem, like any other original writ, is intended to bring the defendant into court, and if he does appear and plead to the merits, like every other, it is *functus officio*. Its peculiar character is lost, and from thence the proceeding is merely personal and must be governed by the same rules. The defendant did appear and plead; and according to the rule, all objections to the regularity of the writ were waived and cannot now avail the defendant.

I will now proceed to notice the grounds taken for a new trial.

1st. The court clearly had not the power to discharge the bail; his contract imposed a legal liability, over which the court possessed no more control, than it would over a debt which he owed, when the payment was demanded. The plaintiff might have released, or the bail might have surrendered the principal, and thus have been rendered competent; and why this last course, which was in the power of the defendant, was not resorted to, can only be accounted for, by supposing, that it was overlooked by the counsel; if indeed the evidence of this witness was of much importance; but their oversight ought not to be considered as an error of the court, and can't therefore avail the defendant.

GREY, *ads.* YOUNG:

2d. The rule which excludes the declarations of third persons, as incompetent and inadmissible evidence, will not be controverted, nor will its application to declarations made by a slave, who by the laws of this state is excluded from giving evidence, be denied. But if we recur to the evidence which is the foundation of this ground of the motion, it will be clearly seen that it has no application. The question in issue was, whether the negro slave sold by the defendant, was sound or unsound; and the witnesses examined as to this point, tell you, that directed by her, they detected at once the presence of a disease which materially impaired her value; or in other words, that in consequence of her complaints, they discovered a hernia of an unusually large extent, which constantly endangers her life. In such a case, the complaints, or declarations, if they may be so termed, are mere matters of inducement; they are the drapery with which the truth is surrounded, and through which we must look to discover its form and substance. There is another view of this subject, which to my mind is equally conclusive, and which applies to all cases of this sort. Such evidence is, I think, admissible of necessity. In diseases less strongly marked, than that complained of in this case, it would be impossible to give character to it, without the aid of such circumstances. In vain would a patient call upon his physician for assistance and relief, if he was not permitted to point out to him the seat of his pain or the symptoms of his disease; and it is from these indicia only, that he is able to fix the character of the disease, and apply the remedy, and for the same reason that they are necessary to him, we must admit them. No evil can possibly result from such a principle; for if unattended by any external symptoms of disease, they never could gain credit. Whatever might be the declarations or complaints, no one would be accredited for them who exhibited all the appearances of robust health and vigor, without the most palpable demonstration of an existing disease. (a)

(a) The complaints uttered by a sick person seem to be among the symptoms and consequences of disease, and clearly admissible on the principle which admits the declarations of parties or third persons, as forming a part of the *res gesta*. In the case of *Aveson vs. Kennaird, et al.* Lord Ellenborough, deciding that the statements of a woman with respect to her health should be received, observes, "if the inquiries of patients by medical men with the sur

LYLES, vs. SIMS.

3. The last ground is general and has not been applied to any particular object, and so far as the merits are concerned, is clearly without foundation.

The motions are refused—*Nott, Richardson, Huger and Gantt*, Justices, concurred.

I dissent: I consider the bond, a matter of substance and not form; a suit may be brought on it, altho' plaintiff in attachment recover.—*C. J. Colcock*.

Answers to them are evidence of the state of health of the patients at the time, this must be evidence. What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing" Lawrence, justice, in the same case, "it is in every days experience in actions of assault, that what a man has said of himself to his surgeon is evidence to shew what he suffered by the assault."

In an action on the case, for giving the plaintiff a dose in some toddy, the plaintiff's mother was allowed to give in evidence what the plaintiff had said the next morning, to shew the effects of the dose. 1 Root, 80.

See *Hoare, vs. Allen*, 3 Esp. Ni. Pri. Ca. 276: *Thompson and Wife, vs. Trevannion*, 5 T. R. 512.

"So where the issue is on the legitimacy of the plaintiff or defendant it seems the practice to admit evidence of what the parties have been heard to say, as to their being married or not married; and with reason, for the presumption arising from the cohabitation is either strengthened or destroyed by such declarations, which are not to be given in evidence directly, but may be assigned by the witness as a reason of his belief one way or other." Bull. Ni. Pri. 294.

EPH. LYLES, ex'r. of Elizabeth Sims, vs. MATTHEW SIMS.

An Executrix having a right to the possession of an estate for life or widowhood, purchased slaves with the mesne profits. Held that they were her individual property, and not a part of the estate, and this notwithstanding her declarations that they were purchased for the estate.

TROVER for two negroes, Hannah and Anderson. Elizabeth Sims died in 1820, and by her will bequeathed all her property to the plaintiff, and appointed him her executor. The plaintiff proved that the negroes were purchased by her many years ago, and that they had continued in her possession up to the time of her death. The defendant's claim grew out of the following circumstances: James Sims, the husband of Elizabeth Sims, died about the year 1796, and in his last will and testa-

LYLES, vs. SIMS.

ment, which was duly proven and recorded, is the following clause, to wit: "Item, my will and desire is, that the residue of my estate, of what nature soever, shall remain in possession of my wife, Elizabeth, under the direction of my executors, until my debts are fully paid and during her widowhood; to be delivered as a loan to either of my five sons, as they may need, agreeably to the opinion of my executors, not to be removed beyond the limits of the state, and debarring the delivery of a slave to my son James; and after the death of my wife, all such estate, together with the increase arising thereon, to be collected together and appraised by three justices of the peace for this county, with the assistance of my said executors, which I give to be equally divided between my four sons, Matthew, John, Nathan, and Reuben, they paying to my son James one-fifth part of the residue of such estate, to be delivered to him."

John Sanders and Peter Brasilman were appointed executors, and his wife Elizabeth, executrix, all of whom qualified.

In pursuance of this clause of the will, a considerable estate consisting of lands, negroes, stock, &c. was left by the executors in the possession of Elizabeth Sims, who finding the annual income more than sufficient for her support, laid it out in the purchase of negroes, amongst whom were those in dispute. Until a few years before her death, she always spoke of these negroes as a part of the estate of her deceased husband, but having become displeased with her children, she said that she had taken counsel on the subject, and was advised that she had the power of disposing of them, and had determined to leave them to the plaintiff.

After the death of Elizabeth Sims, John Sanders, the only surviving executor, took possession of the estate, including the negroes in dispute, and made partition amongst the legatees, the defendant being one, and these fell to his share.

On the trial of the case in the court below, the following questions were made: 1st. Whether, under the will of her husband, Elizabeth Sims took a life estate in the property left in her possession, and had a right to dispose of the mesne profits: 2d. Admitting that she did not, whether the surviving executor had a right to seize on the negroes thus purchased, as an indemnity for the devastavit.

LYLES, vs. SIMS.

The presiding judge was of opinion with the plaintiff, and under his direction, the jury found a verdict in his favor for the value of the negroes.

A motion was made for a new trial, on the ground of misdirection in the foregoing particulars.

The opinion of the Court was delivered by Mr. Justice Johnson.

In the discussion of the question arising out of the first proposition, it was contended on the part of the defendant that Mrs. Sims took nothing under this clause of the will, except the naked possession, which belonged to her in the character of executrix; and at most, no more than was absolutely necessary for her support and maintenance: that the fund with which these negroes were purchased was so much surplus and belonged to the estate; and that therefore they were the property of the estate of James Sims.

It is not necessary to the determination of this case, to enter into the consideration of this question: and as the case will probably find its way into another court, possessing competent powers, it is thought advisable to leave it unfettered by any opinion of this court. I shall therefore only notice the ground on which, in the view of the court, the present motion cannot avail the defendant; which brings me to the second proposition.

To get at this question, it must be conceded that Mrs. Sims took nothing but a naked possession under the will, and consequently, that the fund arising from mesne profits belonged to the estate of James Sims, and it would follow that any disposition of them would be a devastavit.

It is in vain that the declarations of Mrs. Sims, that she purchased these negroes for the estate, are urged in support of this motion. If the funds did not belong to her, in her own right, she had not the power of investing them in this manner, and the legal property must be vested in her. If a loss had occurred it must have devolved on her, and if a profit has been derived from it, she would, for that reason, be entitled to the fruits. (a)

(a) This seems clearly to be the rule of law. A different rule (or a modification of the rule) obtains in equity. If an executor purchase with the funds of the estate, it is at the option of those entitled to the estate, to charge him

WALKER, vs. HARSHAW.

There is another view of the subject, which, in my mind, is equally conclusive. It will be recollected that near thirty years has elapsed since the death of James Sims, and it is impossible in this form of action to obtain an account of her administration of that estate. All that we know of it, is, that at the time she purchased these negroes, there was a disposable fund at her command; but whether the estate was productive before or after, or whether it is or is not now largely indebted to her, we cannot know but by calling her executor to an account; and whether there are not other demands against her of equal or superior degree, we must be ignorant. It is necessary therefore, that this fund should go into the hands of her executor, to be disposed of in the manner provided by law.

The motion is therefore refused.—*Nott, Richardson, Huger and Gantt*, Justices, concurred.

with the money and interest, or to take the property purchased. An executor or administrator is in equity a trustee, and such purchases made by him are subject to all the rules which apply to resulting trusts. But the application of the trust fund must be clearly proved (Qu. in the life time of the executor) or established by the confession of the executor or trustee. See *Ryall, vs. Ryall*, 1 Atk. 58. *Lloyd, vs. Spillet*, 2 Atk. 150. *Lane, vs. Dighton*, Amb. 400. *Boyd, vs. McLean*, 1 John. Ch. Rep. 587. *Doisford, vs. Burr*, 2 Johns. Rep. 408. *Glass, vs. Baxter*, 4 Eq. Rep. 153.

HUGH WALKER, vs. HUGH HARSHAW.

Action on a penal bond to make title to "all that should remain of a tract of land including the improvements, after taking off two hundred acres." The obligor may fix the location of the dividing line as he pleases, so that the improvements be included in the part to be conveyed, and tender of such title will save the condition of the bond; though perhaps an equitable partition might be enforced in another court.

This was an action of debt, on a penal bond, to which the following condition was annexed. "The condition of this obligation is such, that if the above bound Hugh Harshaw, do make good and lawful titles to the above Hugh Walker, of one hundred acres, or all that remains after two hundred acres of land, whereon the said Walker now lives, including the improvements of the said Walker, on or before the 1st day of March next, this obligation to be void &c."

WALKER, vs. HARSHAW.

Some time after the execution of the bond, the plaintiff procured a surveyor, and in company with the defendant, went upon the land and marked a line, laying out to the defendant two hundred acres of land, adjoining other lands owned by him; and both the parties appeared to acquiesce in the line so run. A few days after, the defendant became dissatisfied with the manner in which the line was run, and procured a surveyor and went again upon the land, in the absence of the plaintiff, and marked out another line, varying considerably from the former, reserving to himself, however, no more than 200 acres, and leaving to the plaintiff 167 acres, including the whole of his improvements.

The defendant then made and tendered to the plaintiff a title deed, according to the line last run, and this constituted his defence to the present action.

The jury, under the direction of the court, found a verdict for the defendant: and a motion was made, on the part of the plaintiff, for a new trial, on the following grounds:

1st. Misdirection of the presiding judge, in charging the jury, that the defendant had the power of fixing the location of the dividing line.

2d. Because the defendant was bound by the first line run.

3d. Because the second line was run without notice to the plaintiff.

The opinion of the Court was delivered by Mr. Justice Johnson.

It is not necessary to the determination of this case, to enter into a minute consideration of the several grounds taken in support of the present motion; they are all involved in a general view of the case itself; the conclusion from which appears to me to be irresistible. The condition of this bond requires nothing more of the defendant, than that he should make titles to the plaintiff for all the tract of land on which he lived, except two hundred acres; and that the land so to be conveyed, should include the plaintiff's improvements. Now, it will not be denied, that the plaintiff could not maintain an action on this contract, until the condition was broken. Has the defendant broken it? The answer is no: he has made, or, which is the same thing, offered to make the plaintiff a title to 167 acres of land,

LONG, vs. KINARD.

including the whole of his improvements; which is a literal compliance with the very letter of the condition. His bond therefore, has not been broken, and the plaintiff is not entitled to recover. It is not intended to advance the position, that there is no check on the power of the defendant to have located the land to be conveyed to the plaintiff, so capriciously, that it would have been of little or no value to him; on the contrary, I incline to think that in the partition of land, situated as this was, the same rules which apply to cases of joint tenancy and tenancy in common, ought to prevail; but a court of law possesses neither the power to make such a partition in this form of action, nor of compelling the defendant to carry it into execution. The court of equity alone, it appears to me, could give relief in such a case.

It may be necessary to remark on the 2d ground of the motion, that this action is founded solely on the bond; and even admitting that there was an express verbal agreement, that the line first run should be the dividing line between the parties, (if obligatory,) the defendant is only answerable on that agreement; and in addition to this view, I incline to think the defendant would be protected by the statute of frauds.

The motion is dismissed.—*Richardson, Huger, Colrock and Gantt, Justices, concurred.*

CHRISTIAN LONG, vs. JOHN KINARD.

After pleading to the merits, it is too late to take advantage of the omission to allege a day certain in the declaration, or of the omission to file a bill of particulars, by motion for a nonsuit, or in arrest of judgment.

THE declaration in this case contained two counts; one for money had and received, and another for a certain quantity of cotton, delivered to the defendant, on a contract that he should carry the same to Charleston, sell it, and pay over the proceeds to plaintiff, on his return; and the breach assigned, was, that defendant had not paid over the proceeds. The day was left blank in both the counts; nor was there any bill of particulars filed with the declaration. The defendant pleaded the general issue. When the plaintiff had closed his evidence, the defendant's coun-

LONG, vs. KINARD.

sel moved for a nonsuit, on the grounds, that the day was left blank in the declaration, and that a bill of particulars was not filed with the declaration. The court refused the motion, and the plaintiff had a verdict.

The defendant on appeal, moved for a nonsuit and in arrest of judgment; on the grounds taken in the court below.

The opinion of the Court was delivered by Mr. Justice Johnson.

It is certainly true, that in declaring on a contract, it is incumbent on the plaintiff to set out a day; for the obvious purpose of pointing the defendant to the precise contract on which he sues; thereby enabling him to shape his defence so as to meet it fairly; and it is equally true, that a defendant could never be compelled to plead to a declaration in which the day was not stated. By pleading to the merits, the defendant has admitted that he was satisfied as to the identity of the contract, and all the rational purposes for which the allegation of a day is wanting, is attained. If it had been necessary, to enable the defendant to plead, he might have forced the plaintiff to it by special demurrer; and the objection comes too late at this stage of the case.

The rule of court which requires that an account or bill of particulars should be filed with the declaration, has in view precisely the same object, which renders a day certain necessary; and the same rule will equally apply to this objection generally; but in this case, there are additional reasons why the motion should not prevail on this ground. The second count, to which the evidence exclusively applied, sets out a contract, raised on the delivery of a specific quantity of cotton; and I am at a loss to know how any bill of particulars founded on it, could furnish the defendant with more information than is contained in the count itself. In any view of it, this objection, like the former, came too late: the defendant could only take advantage of it by special demurrer. The motion is dismissed.

The brief in this case, contained a ground for a new trial, but had no foundation in point of fact, and is not therefore noticed.—*Nott, Richardson, Huger, Colcock, Gantt*—Justices, concurred.

CHAPPELL & CURETON, vs. JOHN PROCTOR.

Mistake in setting forth plaintiff's name in the declaration, can only be taken advantage of by plea in abatement: unless in case of variance between declaration and written contract offered in evidence.

It is not necessary to prove a consideration, though the word "value received," be not contained in the note.

THIS was assumpsit on a note, drawn by the defendant, and payable to the plaintiffs, by the name of "Chappell and Cureton," and the declaration was in the name of Chappell and Cureton, omitting their christian names. The defendant pleaded the general issue. The note was in the usual form of promissory notes, but the words "value received" were wanting. The plaintiffs had a verdict, and the defendant now moved for a new trial, or nonsuit, or in arrest of judgment, on the following grounds:

1st. Because the declaration does not set out the plaintiffs' christian names; or that they were partners.

2d. Because the words "value received," are not expressed in the note, and no consideration was proved.

The opinion of the Court was delivered by Mr. Justice Johnson.

There can be no doubt that the first ground of the present motion would have been a good objection, if the defendant had taken advantage of it at the proper time and in the proper way; for it is necessary that the parties to a suit should be as certainly designated as may be conveniently practicable: but it is equally clear that the objection, in this case, came too late; for it is a well settled rule of practice, that a mistake in the name of the plaintiff, can only be taken advantage of by plea in abatement; unless indeed, in cases where the contract given in evidence, differs from the name of the plaintiff, set forth in the declaration. But in this case, they correspond precisely: vide *Chitty on pleading*, 256.

In the case of "Ash and wife vs. executors of Smith," decided in Charleston, at Jan. term, 1823, it was determined, that since the statute, a note for the payment of money pre-supposes a good consideration, with or without the words "value re-

MOYER, *vs.* A. FOLK & ——— FOLK.

ceived;" and if this be correct, the note itself was sufficient evidence of a consideration.

The motion is refused.—*Johnson, Nott, Richardson, Hunger, Colcock and Gantt*, Justices, concurred.



ELIZABETH MOYER, *vs.* JOHN A. FOLK and ——— FOLK.

Note of hand given by defendant, charged as being the father of a bastard child, to plaintiff the mother; upon which, plaintiff's father entered into a recognizance to indemnify the district against the maintenance of the child. Soon after, the child died. Defence to the action on the note, failure of consideration. Decree for plaintiff, and new trial refused.

THE defendant, John A. Folk, was arrested under a warrant issued by a magistrate, on a charge of being the father of a bastard child, of which the plaintiff was delivered. When he was brought before the magistrate, the plaintiff's father and himself had a private conversation, and reported to the magistrate, that they had agreed to settle the prosecution; and the defendant gave the note on which this action was brought, which was for fifty dollars. The magistrate stated to them that he could not permit any accommodation, unless a recognizance, was entered into, to indemnify the district against the burthen of the support and maintenance of the child, as required by the act of assembly. The plaintiff's father accordingly entered into a recognizance, with sufficient security, in the manner prescribed. Shortly after, the child died, and on the trial in the court below, it was contended for the defendant, that it was obvious from the circumstances, that the support and maintenance of the child, was the consideration on which the note was founded; that its death had rendered this provision unnecessary; and that the note was therefore without consideration.

The presiding judge, being of a different opinion, gave a decree for the plaintiff; and this was a motion to reverse that decree, on the ground taken in the circuit court.

The opinion of the court was delivered by Mr. Justice Johnson.

The legality of the contract on which this action is founded, has not been called in question, and the only ground of objec-

MOYER, vs. A. FOLK & ——— FOLK.

tion, is, that the note was founded on a consideration which was to be performed by the plaintiff's father; and which, in consequence of the death of the child, became unnecessary and impossible. This objection, it appears to me, does not necessarily grow out of the case, and admitting it, to its whole extent, still the motion in this case cannot prevail.

The precise terms of the agreement between the defendant and the plaintiff's father, did not transpire, and we must look to the circumstances connected with it, in order to ascertain the true consideration; from which I think it clearly deducible, that, other legal considerations entered into this agreement.

The defendant was charged with being the father of the plaintiff's illegitimate child; and upon his conviction, would have been bound to enter into recognizance, with security, in the penalty of £60, conditioned for the payment of £5, annually, for its support and maintenance; and in the event of his being unable to give the security, he was liable to be bound out for a term of years, to raise a fund for that purpose; and a discharge from these liabilities, by the plaintiff's father entering into the recognizance, if not exclusively, was obviously the primary consideration of the note. The plaintiff's father has performed his part of the contract; and there can be no good reason why the defendant should not perform his. He was under no compulsion to enter into it, and if he has made a bad bargain, he must perform it. It is no excuse for the non performance of a contract, that the loss to the opposite party, or the services to be performed by him, fell short of what was calculated; a contrary rule would have the effect of destroying the power of contracting entirely.

The motion is refused.—*Nott, Richardson, Huger, Colcock and Gantt*, Justices, concurred.

MAYSON SMITH, vs. JOSIAH GOGGANS.

The defendant, an administrator, pleaded non assumpsit and plene administravit præter. Issue on the first plea, found against him. Held that defendant was liable to costs, de bonis propriis. Administrators are so liable when they plead a plea which is found against them, or is untrue in fact.

THE plaintiff declared in assumpsit, on a contract made by defendant's intestate. The defendant pleaded *non assumpsit* and *plene administravit præter*. The plaintiff confessed or allowed the last plea and went to trial on the general issue; which was found against the defendant. The plaintiff entered up judgment and sued out execution against the defendant, *de bonis propriis*, for the costs of this issue: and this was a motion to set aside the judgment and execution, *quo ad hoc*; on the ground, that the defendant was not liable for the costs, *de bonis propriis*. The presiding judge refused the motion, and it was now renewed in the form of an appeal from that decision.

The opinion of the Court was delivered by Mr. Justice Johnson.

The general rule is, that if the party defends as executor or administrator, he is liable for costs, as other defendants; and the judgment, as to the costs, is, *de bonis testatoris vel intestati, si, &c. et si non, tunc de bonis propriis*. Hullock's Law of Costs, 196. This rule, like all others, must be understood with reference to the subject to which it relates. In actions between parties, in their own right, if there are several issues, and judgment be given for the plaintiff on any of them, the defendant is liable for costs; or in other words, the costs follow the judgment. But, it is not always so in actions against executors and administrators; for if they plead *plene administravit*, or *plene administravit præter* only, and the issue taken thereon be found for them, they are not liable for costs *de bonis propriis*, although judgment is given for the plaintiff, of assets *quando acciderint*. It follows then, that the correct rule is, that they are only liable when they plead a plea which is found against them or one which is not true in point of fact. Hullock's Law of Costs, 197-8. 1 Saunders, 336, a. & b. Note 10.

In this case, the issue was taken on the plea of *non assumpsit*; which was found against the defendant: the plea was there-

THE STATE, vs. COUNCIL.

fore not true in point of fact; and according to the rule, the defendant is liable for the costs *de bonis propriis*.

The motion is refused.—*Johnson, Nott, Richardson, Hunger and Colcock*, Justices, concurred.—*I dissent, Gantt*.

THE STATE, vs. HARDY COUNCIL.

Indictment under Stat. 1. Anne, St. 2. c. 9. for a misdemeanor in receiving stolen goods. The goods had been stolen by a slave, who was convicted of the larceny, before a court of magistrates and freeholders, and sentenced to be whipped. Held, that as the principal had been convicted, the indictment could not be sustained under the statute; nor as for a misdemeanor at common law.

Qu. Whether conviction before the court of magistrates, can be given in evidence on the trial of the accessory? What shall be sufficient evidence of such conviction? Is it not necessary that such conviction should be set forth at length in the indictment? As the punishment by the magistrate's court is discretionary, may other evidence than the conviction itself be received to shew that the offence was grand or petit larceny?

THE defendant was indicted under the statute of 1. Ann, St. 2. c. 9. made of force in this state, as a receiver of stolen goods. The indictment charged, that "the defendant, being a person of evil name," &c. "four sides of leather and eight pair of shoes, of the value of twelve dollars, of the goods and chattels of John Howell, by a certain ill disposed negro slave, (by the name of Washington, the property of John Romanstine,) there, lately before, feloniously stolen, of the said negro slave unlawfully and unjustly, and for the sake of wicked gain, did receive and have; the said Hardy Council, there and then well knowing the said goods and chattels, so as aforesaid, to have been feloniously stolen," &c.

At the request of the solicitor who prosecuted, it was admitted, on the part of the defendant, that the slave, Washington, had been before tried, and convicted of the larceny, before a court consisting of magistrates and free holders, organized agreeably to the act of assembly, and that his sentence had been executed by whipping on the bare back. The proof of the defendant's guilt was perfectly satisfactory, and his council

THE STATE, vs. COUNCIL.

were about to urge the exceptions stated below, in the argument to the jury; but on the suggestion of the court, that they might avail them on a motion in arrest of judgment, they were waived and the defendant was found guilty.

This was a motion to arrest the judgment, on the following grounds;

1st. Because, the principal having been convicted and punished, the receiver cannot be indicted for a misdemeanor.

2d. Because, the principal having been convicted of petit larceny, the defendant could not, under the statute, be indicted for a misdemeanor.

Notice was also given, that if these grounds failed, a new trial would be moved for, on the ground, that the court misdirected the jury in charging them that the foregoing were questions of law, which it was not their province to decide.

The opinion of the Court was delivered by Mr. Justice Johnson.

The two first grounds which are set down in arrest of judgment, contain propositions so clearly settled by authority, that all reasoning upon them would be wholly lost. The defendant, it will be observed, is indicted under the statute of *Ann, St. 2. c. 9.* which is of force in this state, as for a misdemeanor. Upon referring to that statute, it will be found that it is only intended to apply to cases where the principal offender has not been convicted. In this case, it is in evidence that the principal offender was convicted and consequently the statute does not apply. It has been contended however, that although the indictment may be bad, under the statute, yet it may be good as for a misdemeanor at common law. It is true that receiving stolen goods was a misdemeanor at common law; but the statute of *3d. & 4th. Wm. & Mary, c. 9.* also of force here, makes the receiver an accessory after the fact, and places him precisely in the same situation as an accessory at common law, which operates as a repeal of the common law, for the obvious reason that it wholly changed the character of the offence; *3d Chitty, Crim. Law, 713, 14.* It follows therefore conclusively, that when the principal felon has been convicted, the receiver can only be indicted as an accessory after the fact. These remarks apply to the first ground only, but the rule with respect to

THE STATE, vs. COUNCIL.

the second, is equally clear. The statute of William and Mary, only applied to cases where the common law admitted of accessories; and by the common law, there could be no accessories in petit larceny; so that if in truth, the principal was convicted of that offence, the defendant ought to be discharged, 3d. *Chitty*, 713. *The case of Abraham Evans, Foster*, 73.

It is necessary here to remark, that these grounds apply rather to the motion for a new trial, than in arrest of judgment; as they arise out of the facts proved, rather than out of the indictment. The defendant's counsel were however, led to this course, by a suggestion of the presiding judge, in the court below; the defendant is therefore entitled to the full benefit of them, and a new trial is accordingly ordered.

For the purposes of the present motion, it would be unnecessary to remark further on the case; but the offence of the defendant, as developed by the evidence, was very flagrant, and as the probability is, that the prosecution will not be abandoned here, I have thought it advisable to notice a few difficulties which may present themselves in the course of the prosecution, rather with a view of directing the attention of the council to them, than to express any decided opinion upon them.

The principal felon in this case, was a slave; and was tried and convicted before a court consisting of magistrates and freeholders, organized under the act of 1740. *Pub. Laws* 166; and this act authorizes them to inflict, in cases *not capital*, any punishment at their discretion, not extending to life or member; and it may admit of a question: 1st. Whether such a conviction can be given in evidence on the trial of the accessory? 2d. What shall constitute sufficient evidence of a conviction? 3d. Whether, in as much as the conviction was in another court and under another jurisdiction, it is not necessary to set out the conviction at full length in the indictment? 4th. Whether, the punishment being discretionary, other evidence than the conviction itself may not be permitted, to show that the offence of the principal was grand or petit larceny, and thereby give character to the offence of the receiver. Under all these circumstances, my mind inclines strongly to the conclusion, that the prosecution against the receiver, as accessory, may be sustained on such a conviction; but the object of these remarks is

HOPKINS, vs. MYERS.

attained, by calling the attention of the counsel to the questions which may arise.

Johnson, Nott, Richardson, Huger, Colcock and Gantt, Justices, concurred.

JOHN HOPKINS, vs. DAVID MYERS.

Though in actions sounding altogether in damages, the court will not, in general, grant a new trial for excess or deficiency of damages; yet a different rule should prevail, when the pecuniary extent of the injury can be precisely ascertained: still subject however, to exceptions, as in cases of great mitigation or aggravation, or where it may be supposed that the jury were as competent to judge of the extent of injury as the witnesses.

In trespass to try title, the jury found that "the old hedge row, &c." was the dividing line between the parties. The metes and bounds of the plaintiff's claim being set out in the proceedings, and the contest turning altogether on this boundary, it was held, that the verdict was sufficiently certain for entering up a judgment; and if otherwise, the intention of the jury being perfectly clear, the verdict might be amended.

This was an action of trespass to try titles to a tract of land, in which the jury found the following verdict: "We find for the plaintiff, with one dollar damages: we also find that the old hedge row, beginning at the river, and a line running along the same, to its termination, and a line to be drawn from thence, so that it will intersect the course of an old line, re-surveyed by A. B. Stark, in 1813, in the centre of the gut next to the river, and then along said last mentioned line, until its intersection with the tract of land said to belong to Raiford, is the dividing line between the parties." If this verdict can be carried into effect, it gives to the plaintiff about two acres of land, which the defendant claimed, and which he had had in possession and cultivated for several years; and one witness expressed opinion that its use, during the time defendant had it in possession, was worth ten dollars.

The plaintiff moved for a new trial, on the following grounds:

1st. Because the jury did not find the damages proved.

2d. Because no judgment can be entered on the verdict.

HOPKINS, vs. MYERS.

The opinion of the Court was delivered by Mr. Justice Johnson.

The effect of the verdict in this case, so far as the damages are concerned, is to divide the costs between the parties; and it is obvious that the first ground of the motion is founded upon the assumption of the fact, that the damages actually sustained amounted to more than a sufficient sum to carry the costs.

In actions sounding altogether in damages, the general rule is, that this court will not interfere, on account of the excess or deficiency of the damages; except indeed, in those cases where they are so inconsiderable or so great, as to excite a belief that a jury has acted under an improper influence. I think a different rule ought to prevail, when a specific injury has been sustained, the extent of which can be precisely ascertained; as for instance, in trespass for destroying a building, the cost of which is clearly proved; then I think, generally, the jury would have no more power to find a less sum than the injury actually amounted to, than they would to find a part of a debt which the plaintiff claimed and proved. But this rule, like all others, must admit of exceptions; and would not probably apply to a case where a trespass was committed under such circumstances of mitigation, or provocation, on the part of the plaintiff, as bordered on a justification; or, as more strictly applicable to this case, when the quantum of damages testified to by the witness, grew out of calculations made on circumstances of which the jury would be as competent to judge as himself.

In this case, the quantum of damages depended on the extent of the positive injury sustained. What it amounted to, was a mere matter of opinion with the witness, growing out of circumstances upon which the jury were as competent to express an opinion, as himself; and notwithstanding the inclination of my own mind is in accordance with the opinion of the witness, I am not prepared to say that the jury have not acted within the rule, and therefore within their legitimate powers.

There is also another motive for coming to this conclusion. This is the second trial of this case; and on the former trial, although the jury found the land in dispute for the plaintiff, they refused to give any damages. The court has no power to award them; and the sole object of sending it back, would be to charge

HOPKINS, vs. MYERS.

a jury to try the question, whether the plaintiff or defendant should pay the costs. It is a subject over which it has no power; and to send it back, would be to indulge the parties in an idle speculation, calculated to obstruct the administration of justice and to annoy the court.

The second ground assumes the position, that the verdict in this case is uncertain; in as much as it does not express in terms, the precise boundaries of the land found for the plaintiff; and that therefore, a judgment cannot be entered up for it.

The plaintiff claimed under a grant to William Greenland, for three hundred acres, dated in 1749; and the defendant, under a grant to John Pettenger, dated in 1747. The grant under which Plaintiff claimed, called for that under which the defendant claimed, as a boundary; and the whole case resolved itself into the inquiry where this boundary was to be located. The proceedings ought and I presume, do point out, the metes and bounds of the land claimed by the plaintiff; and the effect of the finding is to give him all the land claimed, unless it is controlled by the line ascertained by the verdict; which is as distinctly pointed out as could be done from the facts before the jury; and appears to me as certain as the thing was capable of; and if the plaintiff's claim does not cover it, he has no right to complain. If it went beyond, he is bound by it, and can ask no more. I cannot therefore, see the uncertainty of which the plaintiff complains.

It is of some importance that this case should be put to rest, and there can be no doubt about what the jury intended by the verdict; and if it should be thought necessary, to enable the plaintiff to enter up his judgment, there can be no good reason why it should not be so amended as to effectuate the intention of the jury.

Nott, Richardson, and Gantt, Justices concurred.—I dissent, Colcock.

THE STATE, vs. PHILIP PETTY.

Prisoner indicted under the Act of Assembly, 1736, 7, for forgery, and passing a forged bank note. The charge in the indictment, is "did dispose of and put away:" the words of the act, "utter and publish." Judgment arrested. The words of a statute, describing an offence, should be pursued with the utmost exactness.

An officer of the bank ought to have been examined, to prove that the note was forged.

Evidence of the prisoner's having had in his possession other notes, supposed to be forged, was properly admitted in evidence, to shew his knowledge that the note passed by him was a counterfeit.

THE prisoner was indicted under the act of 1736, 7, (*Pub. Laws*, 147,) for forging a note of the Bank of the State of South Carolina, and also, for "disposing and putting away" a bill of the Bank of the State of South Carolina, as and for a true note. Upon the trial he was convicted, and now moves in arrest of judgment and for a new trial:

In arrest; because there was no evidence of the forgery, and the verdict therefore must relate to the second count, which is defective, in as much as it does not state any offence against the act. The words used in the second count of the indictment, are, that the prisoner, "*did dispose of and put away* the said note, as and for a true note."

No rule is better established, than that the offence must be stated in the indictment with strict technical accuracy, and it must be obvious that this rule cannot be complied with, by using any other words than those used in the statute. The words of the act, are "*did utter and publish as true*," which are more general and comprehensive than "*dispose and put away*." Mr. Chitty says, in treating on this subject, (*1st. Vol. p. 286*), "it is in general necessary, not only to set forth in the record all the circumstances which make up the statutable definition of the offence, but also to pursue the precise and technical language in which they are expressed; as in rape, the word *ravish* must be used and in an indictment under the statute for perjury, the word *wilful* must be used; although in an indictment for the same offence at the common law, it is not necessary." And he is supported in this position by *Foster*, 220, 304, 2. *Hall*, 170, 2. *Leach*, 1107, *Hawkins*, 62, chap. 25; and a number of other

THE STATE, vs. PETTY.

authorities. Mr. Chitty's language is, "it is in general necessary." But on examination, it will be found that the exceptions to the rule are of a doubtful character and of ancient date, and for the most part refer to a description of *offenders* and not *offences*. He concludes however, by remarking "that at all events, in every case, it is advisable to attend with the greatest nicety to the words contained in act, for no others can be so proper to describe the crime. The exceptions, if any, are doubtful, and the broad principle, which renders a strict adherence essential, is supported by too strong a number of decisions to be shaken.

Here the case might be disposed of, but as the grounds for new trial are important, and some of them unsettled by any cases which are considered authority, and as the prisoner may be again indicted, I shall consider them in their order.

1st. Because the best evidence of the bills being a forgery, was not produced; as a proper officer of the bank, could have testified to that fact with more certainty than any ordinary citizen.

The forgery was alledged to have been committed by altering a genuine two dollar bill of the bank of the State of South Carolina, into a bill purporting to be a fifty dollar bill; and the presiding judge reports, that none of the officers of the bank, gave evidence. That the best evidence which the nature of the case admits, shall be produced, is not only the first, but one of the best, and best established rules of evidence; and it certainly cannot be applied with more force in any case than in a case of life and death. The question then will be, whether any individual, can be as capable of proving a bank note to be forged, as one of the officer's who is conversant with the hand writing of all the officers and who knows all the various, devices and private marks affixed to the bills. When it is recollected how easily a hand writing may be imitated and how difficult it is even for the person whose writing is imitated, to say whether it be his writing or not; it must be admitted that any additional circumstance of devices or private marks, which would go to establish the forgery, would be much more satisfactory than the mere proof of the falsity of the writing.

But it was contended on the part of the state, that the production of a bank officer, was never required, and indeed could not be, because he would not be a competent witness.

THE STATE, vs. PETTY.

It will be admitted that the authorities appear to differ on this point; but it is conceived that the apparent difference can easily be accounted for and reconciled. Where the indictment is for forging a note of a private individual, he cannot of course be admitted as a witness, and in such case, it has been admitted (ex necessitate) to disprove his hand writing by others. But in the case of the forgery of the note of an incorporated bank, in which case the officer has no private interest and no private responsibility, it has been long settled, that any officer of the bank may be a witness, and that some one who is competent to prove the forgery, by all the means by which it may be detected, must be produced. In the case of the *King, vs. Ab. Newland*, this point was settled so long ago as 1784, 1 *Leach*, 350; and in the case of Dennis M'Guire, the prisoner was convicted without disproving the hand writing of the cashier. The forgery was established by evidence which shewed that the instrument was false in all its parts; in the texture of the paper; the water mark; the engraving; the ink, and the written date of the year; being altogether proved to be such as the bank never made or issued. 2 *East's Pleas of the Crown*, 1002: nor can it be doubted that such evidence would be abundantly more satisfactory, even by an inferior officer of a bank, than disproving the hand writing of the maker of a note.

The second ground for new trial is; because the court permitted evidence to be given to the jury of the fact of the prisoner's having had other bills in his possession, supposed to be forged. On this ground, the court concur with the presiding judge. The question was, whether the prisoner passed the bill, *knowing it to be counterfeit*. Any circumstances which went to shew this knowledge, are clearly admissible. What effect the testimony is to produce, must be left to the jury, and would necessarily depend upon the degree of certainty in the evidence. How is this fact ever to be proven, but by circumstances? And that circumstances can tend more strongly to prove that a man knew a bill to be forged, than his having other bills of a similar appearance (to the one proved to be a forgery) in his possession? It is said that it is taking the prisoner by surprise; that it is allowing proof of his having committed one crime, to be given in evidence on the charge of another. But this is certainly a mistaken view

THE STATE, vs. PETTY.

of the subject; for it is no crime to have a forged bill in one's possession, although it may become a crime to pass it, after it has been suspected. Nor can it operate as a surprise; for knowing that he had the possession of such other bills, the prisoner might and ought to be prepared to do away the effect of such possession, if it is in his power.

But let it be admitted that it is a crime, yet if the proof of it has a tendency to support the issue, in the case before the court, it is admissible. It has been determined, as to this very offence, that proof of a man's having passed other forged notes, may be given in evidence. In "*The King, vs. Leach, Wylie, and others; 4 Bos. & Puller, 92.*" This was the unanimous opinion of the court. If, on a charge of horse stealing, an attempt should be made to prove that the accused had, on some other occasion, stolen a horse, such evidence would be inadmissible; because it would have no tendency to support the issue; the acts are entirely independent of and unconnected with each other.

The third ground for new trial is, because the court permitted a witness to give evidence against the prisoner, although he himself admitted he did not believe in a future state of rewards and punishments. The rule on this subject is well settled. If one called as a witness, does not believe in God, and a future state of rewards and punishments, he cannot be sworn; for there is no sanction to such an one. An oath is an appeal to God for the truth of what is said; and it is supposed that one who believes in God, and knows his attributes, will not venture to invoke his wrath, by false swearing. But where is the security, if there is no belief? In *McNally*, p. 96, it is said, where the objection to competency is grounded on the infidelity of the person produced to be sworn, the proper question to be asked, is not, whether he believes in Jesus-Christ, or in the Holy Gospels of God; but, whether he believes in God, and a future state of rewards and punishments; and it will be found to be so stated, substantially, in *Peake, Phillips*, and all the other writers on evidence. It was argued that the rule must be considered as abrogated, by that part of the constitution which guarantees the liberty of conscience. I have always regarded that as a wise provision in the constitution; and shall

HAVIS, vs. BARKLEY.

never believe that it was intended to banish all religion; nor can I permit myself to enter seriously into any arguments on a question which I most earnestly hope will never be seriously entertained in these United States.

Richardson, Justice, concurred.

We concur on the ground taken in arrest of judgment, and reserve the grounds taken for a new trial.—*Johnson*, *Huger*.

I concur in this opinion, except as to the admission of the testimony of the witness, Foster, on which I give no opinion.

Nott, Justice.



JESSE HAVIS, vs. HUGH BARKLEY, Sheriff.

That a witness merely believes himself interested in the event of the suit, does not render him incompetent.

THIS was an action against the defendant, for having failed to do his duty, in arresting one Thomas Ivey; against whom the plaintiff had issued a bail writ. The defendant called Elijah Ivey, the father of Thomas, against whom the bail process had been issued, as a witness; who was rejected on the ground of incompetency, and a verdict was given for the plaintiff, for the full amount of the debt. A motion is now made for a new trial, on the ground, that Elijah Ivey was not incompetent (together with other grounds which the court do not think it necessary to notice.) It appeared after much examination of the witness, who did not seem well to understand the nature or extent of his responsibility, that he had promised the sheriff that "if he had to pay," he, witness, would pay him: he meant, to keep him harmless: from which, he said, he thought himself interested; and the presiding judge declared him incompetent. This is a subject on which there has been much controversy, and cases can be found where a witness has been excluded, because he considered himself interested.

But it is now well established that he is to be excluded, merely because he conceives himself interested; or that he is bound in honor to indemnify the party calling him, should he lose the suit. The experience of ages has induced the courts to narrow down the objections to competency. It is much bet-

HARRIS, vs. BARKLEY.

ter, in these doubtful cases, to admit witnesses, and let the jury determine on their credibility.

Besides, excuses of this sort are easily fabricated, and one may suddenly find himself deprived of a witness on whom he had relied. A review of the cases in which witnesses have been declared incompetent, because they thought themselves interested, will shew that the rule is not only injudicious, but that it is inconvenient in its application, and involves a manifest absurdity. In such cases the court is not precluded from examining the witness on a variety of points, in order to ascertain the ground of his belief; and not unfrequently such examination ends in the most obvious conviction on the mind of the court, that the witness is not in reality interested. How improper must it be, in such case, to exclude the witness; for how can it be believed, that a man can think himself interested, who is expressly told by the court that he is not. In a late case, it is said to have been determined by Sir Wm. Scott, that one who thought himself entitled by law to a share in the prize, was incompetent; and that he said, he always understood the distinction to be, that if a witness says he expects to share from the bounty of the captors, he is not inadmissible; but if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent; however *erroneous* that opinion may be. What does this amount to, but that a man may be excluded who is not interested?

Again, it is easy to trace this rule to cases in which the mere dicta of judges are used in its support. I find on an examination of the cases, that in all of them, the witnesses not only *said* they believed themselves interested, but that they were really so. Now here, the witness was not interested. His promise was a mere verbal one, to indemnify the sheriff for neglecting his duty; on which no action would lie. Had he been told he was not interested, he would have been satisfied: But if not, he would only have been presented to the jury as a witness on whose mind there might be a bias. See 1. *Phillips*, 43, 44. It is much better to adhere to the plain rule, that *there must be a direct and obvious interest*, to exclude a witness. I shall say nothing on the merits of the case, as it is again to be submitted to a jury.

The motion is granted.—*Johnson, Nott, Richardson and Gantt*—Justices, concurred.

JAMES REMBERT, *ads.* JAMES KELLY.

Action on the case, against a Justice of the Peace, for improperly issuing an execution, and causing plaintiff's horse to be seized and sold. The acts of 1812 and 1817, "for giving landlords and lessors a summary mode of regaining possession, &c. requires two justices to execute it." Defendant acted alone, and issued execution for the costs. Held, that defendant was liable to an action, having acted without jurisdiction: But,

That trespass, and not case, was the proper remedy; the injury being direct.

The opinion of the Court was delivered by Mr. Justice Colcock,

THIS was a special action brought against the defendant for causing plaintiff's horse to be seized and sold, under an execution issued by him for the costs of a mis trial, which happened in a case under the acts of 1812 and 1817, for affording to landlords and lessors a summary mode of regaining possession from tenants and lessees in certain cases.

The last of these acts requires that two magistrates should sit in such cases, and the defendant *alone*, caused the jury to be impannelled, and presided on the trial.

The jury could not agree on a verdict, and were discharged; and the defendant, for the costs of such mistrial, issued his execution, and caused the plaintiff's horse to be sold. The jury found a verdict for the plaintiff, and the defendant applies for a new trial, nonsuit and in arrest of judgment. A number of grounds are stated, which it is not necessary, from the view which the Court has taken of the case, to consider. The important questions are; first, whether an action can be maintained against a magistrate for such an injury; and, secondly, whether *case* is the proper action. The counsel for the defendant, both in the court below and here, has taken the broad ground, that no one clothed with judicial power can be subjected to a civil suit; and has contended that the magistrate in this case was in the exercise of such powers, and must be considered as only having committed an error of judgment, for which he is not responsible in damages; and has referred to a number of authorities which shall be examined in their order. It must be obvious that such protection is indispensably necessary for the due administration of justice and the support of the law, in all the higher tribunals of justice, in which we have a right to expect a union of talent and integrity; to whom, therefore, such an indemnity may be with more propriety extended; and who are made par-

REMBERT, *ads.* KELLY.

sponsible at the bar of the people. But it would be lamentable, indeed, if the inferior tribunals of justice were to be thus shielded. As much protection is, however, given to them as can be afforded with a due regard to the rights of the citizen. Where they keep within their jurisdiction and act from pure motives, they cannot be made amenable to a suit for damages. It is scarcely possible to open a book on this subject, which will not shew the magistrates may be made to respond in damages where they exceed their jurisdiction; when their acts are so palpably unjust as to be the result of sheer ignorance, a total disregard to the rights of their fellow citizens, or corrupt motives. (a) In looking into the subject, we are struck with the various statutes

(a) I have not found any case in which it has been decided, that a civil suit may be maintained against even an inferior judicial officer, for an injury done by an erroneous judgment, on a matter within his jurisdiction; even if the error were wilful, or the effect of corruption: though a contrary inference might be drawn from some expressions used in the opinions delivered in the cases of *Reid vs. Hood & Burdine*, & *Young vs. Herbert*. 2. *Nell & McCord*, 168.

There is no doubt, however, that a justice of peace may be punished by indictment, for corruption in office; even though the judgment corruptly procured should be correct, which would of course furnish no ground for a civil suit. So I presume, he might be punished for a violation of law, so palpable and gross as to leave room for no other inference but that it was wilful; or perhaps where it was the effect of such extreme ignorance as to render it criminal for him to have undertaken the exercise of the office. Under precisely the same circumstances, I should suppose, the judges of the superior courts might be punished by impeachment: and so far superior and inferior judicial officers appear to stand on the same footing.

It strikes one at first view, that any judicial officer must be responsible to prosecution or private suit, for an injury done in a matter without his jurisdiction; because as to such matter, he is no judicial officer at all. It is the mere private wrong of a private person. Yet numerous decisions have settled that judges of superior courts are exempted from responsibility to suits or prosecutions, for any act done in the exercise of their official functions. And for this there are obvious reasons, independent of the presumption, that trusts so important will be committed to men of talent and integrity: which might, in one point of view, seem a reason for subjecting them to greater responsibility, if they are found deficient in those qualifications. Their jurisdiction, though not strictly unlimited, is yet not defined, as inferior jurisdictions are; and they themselves must necessarily be the judges of its extent. To make them liable, therefore, for exceeding their jurisdiction, would be to render them responsible for error of judgment.

The decision of one of these judges, that the matter pertained to his jurisdiction, would be of as much authority as that of any tribunal before which a suit or indictment could be brought, determining the contrary. An appellate court may reverse their judgments, but not control them in the exercise of their

REMBERT, *ads* KELLY.

of Great Britain made for their protection. Such as limitations to the suits; provisions that they must be previously notified of the intention of the party intending to sue, and declaring that without such notice the party shall be non-suit-ed; that the suit may be brought in the proper county; that they may tender amends, &c. See 2 *Selwyn*, 923 to 928. The cases referred to by defendant's counsel were, 1st. the case of *Bentham*, 2 *Bay. p.* 1. That was a case of commitment by the magistrate for a contempt; and it was clear he had such power, and exercised it properly. The next was the case of *Yates vs. Lansing*, 5 *Johns. Rep.* 282, which can have no application, as it was the case of a judge of one of the superior courts, the Chancellor of New York. But I shall hereafter refer to it, as supporting the general positions as to magistrates. The third was the case of *Williams vs. Spencer*; where it was decided that a constable who broke into an inner room to arrest the plaintiff, was not answerable, having authority to do so; 5 *Johns. Rep.* 352: and the fourth, *Justice Burdine's* case; 2 *Nott & M'Cord*, 168; in which the general position which I have laid down is expressly recognized. Mr. Justice Richardson, in delivering the opinion says, they, the justices are not liable, "unless wilfully wrong or negligent, or at least convicted of such ignorance as shews a depravity in undertaking to give an opinion;"

jurisdiction; as they may control all inferior judicial officers. From the nature of their offices, therefore, they must of course be exempted from this sort of responsibility.

Yet even a judge of a superior court may, perhaps, be liable to a suit or prosecution, in some cases that might be imagined; where he had committed a crime or private wrong, and by a mere evasion endeavored to screen himself under the pretext of exercising his official functions. "If the court of Common Pleas," says Hawkins, B. 6. C. 28. S. 6. "give judgment on an appeal of death, or justices of the peace on an indictment of high treason, and award execution, both the judge who sentences, and the officer who executes, may be guilty of felony; because these courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void and without any foundation." "Even the judge who condemns a man cannot execute his own sentence." Hale's P. C. 433: and if he did he would be guilty of murder. So I suppose, if he should commit an assault and battery under the pretence of executing a sentence of his own, he would be liable for the trespass. See 3 *Bac. Ab.* 674. *Tit. Murder and Homicide, E; Case of the Marshalsea.* 10 *Co. Rep.* 76. See also the cases cited in the note to *Young & Herbert*, 2 *Nott & M'Cord*, 174. *Hammond vs. Howell*, 1 *Mod.* 184; 2 *Mod.* 218. *Floyd vs. Barker*, 12 *Co.* 23. *Ains vs. Sedgwick*, 2 *Roll. Rep.* 199.

REMBERT, *ads.* KELLY.

and in that case, the question determined was one of technical nicety, and on which the judges of the superior court differed. In the case of Yates and Lansing, before referred to for another purpose, Chief Justice Kent, in stating the law on this subject, points to the distinction between inferior and superior tribunals. "Where courts of special and limited jurisdiction exceed their powers, the whole proceeding is coram non judice, and all concerned in such void proceedings are held liable in trespass;" and he referred to *the case of the Marshalsea*, 10 Co. 68: and *Terry vs. Huntingdon*; *Hardres*, 480. In subsequent part of the opinion, he repeats the same doctrine; "inferior courts are only protected while acting within their jurisdiction:" and the reason is obvious: to such the extent of jurisdiction is marked out and defined.

But I will not multiply arguments on a point so long and well settled by adjudged cases. By the statute of 18 *Eliz. c. 3. s. 2.* Two magistrates are required to sit on the case of a woman's refusing to filiate her bastard child. In the case of *Weller vs. Toke*, 9 *East* 364, the defendant acted alone and committed the mother, and was sued in an action of trespass and false imprisonment; and a nonsuit was ordered on the ground above, of a want of notice of such intention to sue, as required by the 24 *Geo. 2. c. 44*; whereby he was prevented from tendering amends.

In the case before us, however, there can be no doubt; for the jury have determined that the defendant acted maliciously. They were instructed not to find vindictive damages beyond the real amount of what the defendant had sustained, unless they concluded from the testimony that the defendant had been influenced by malicious motives, or acted corruptly, and they have found damages far beyond the the amount of the injury sustained.

But on the ground in arrest of judgment, the defendant must succeed. Mr. Chitty puts this subject in a clear point of view: in treating of actions and laying down rules by which it shall be determined whether the action of trespass or case shall be brought, the first and most obvious one is, that where the injury is direct and immediate, the action must be trespass. It is in some cases, (such as the collision of ships,) difficult to decide when the act is to be considered as direct and immediate; but in a case like the present there is no difficulty; for the act is

AIKEN, vs. JONES.

as direct as the case of the log being thrown against a person, as contra-distinguished from its being placed in the road and one falling over it. Trespass must be laid *vi & armis & contra pacem*. But the force may be constructive. All illegal acts are in the eye of the law forcible and against the peace. Another important consideration is the subject on which the injury operates; whether the property, the person, or the reputation. In page 165, treating of the action of trespass, he says, in its application to personal property, it is to be considered with reference, first, to the nature of the thing affected; second, plaintiff's right thereto; third, the nature of the injury. As to the first trespass lies for taking or injuring all domiciled and tame animals. Secondly, the property must be in plaintiff's possession, either actual or constructive. Thirdly, as to the nature of the injury, it may be either by an unlawful taking of the property, or by injuring it while in the possession of the owner or bailee. Thus it appears that where the act complained of is unlawful, immediate, and operates on the personal property, trespass is the proper action. If further authority could be necessary, it will be found in an examination of the cases themselves, by which it will appear that trespass is the action used: and of the statute of 43 Geo. 3 c. 141, by which it is enacted, that in certain cases therein enumerated, case only shall be brought. 2 Selwyn, 929.

Johnson, Nott, Richardson, Justices, concurred.

DAVID AIKEN, vs. MARY JONES.

Trespass Quare clausum fregit, plaintiff was in possession of a tract of land, part of which was covered by an older grant; of this part defendant was in possession. Held that plaintiff's possession could not be construed to extend to the land covered by the older grant, though within the lines of his own.

The opinion of the court was delivered by Mr. Justice Colcock.

In this case, the plaintiff claimed under a grant which covered the possession of the defendant; but the defendant's possession was within the lines of a grant older than that of the plaintiff. It was contended by plaintiff's counsel, that a possession of a part is a possession of the whole; and that as the defendant's possession was within plaintiff's lines, he plaintiff

LOVE, vs. DENNIS.

ought to recover. To this, it was replied, that under the plea of not guilty, the plaintiff must shew a trespass; and that as defendant's possession was under an older grant than plaintiff's, the plaintiff's lines must be bounded by such older grant: Therefore, no trespass could be proved. A verdict was found for the defendant, and an appeal was brought up on the ground of misdirection of the presiding judge, on this point; and also on other grounds, which are not considered as having any bearing on the point on which the whole case turned. Much evidence was given as to the title to the grant on which defendant lived; but it is unnecessary to take notice of that. The only point for determination is, whether the plaintiff's possession is to extend to the lines of his grant where these lines conflict with an older grant. It is conceded that a possession of a part is a possession of the whole. But what is the whole? How far shall the plaintiff's grant extend? His lines must be bounded by those of the older grant. He cannot be said to have possession of any of the land within the lines of the defendant's grant, for his land does not extend so far, and possession of his own land cannot be converted into a possession of another's land.

If the case had depended upon the plea of liberum tenementum alone, it might have been otherwise, for then it would have been a question who had the best title, and the defendant's possession having been of short duration, the plaintiff might have recovered.

The motion is refused.—*Huger, Johnson, Nott, Richardson and Gantt*, Justices, concurred.



JAMES & MITCHELL LOVE, vs. MARY DENNIS.

Wife of a tenant, remaining in possession after her husband's death, shall not be permitted to set up a title against the husband's landlord.

Tenant shall not be permitted, by taking a lease from a third person, to aid such a one in setting up a title against the landlord.

In this case it appeared that the defendant, was the wife of the tenant to the plaintiff, and the presiding judge refused to permit her to question the title of plaintiff; and a verdict was given for plaintiff. A motion was now made for a new trial, on the

LOVE, vs. DENNIS.

ground, that the rule cannot apply to the wife of a tenant; that by death, the connexion of husband and wife being dissolved, she must be considered as a stranger to the plaintiff.

The opinion of the Court was delivered by Mr. Justice Colcock.

It is a universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord: and this is not merely a technical rule, but one founded in public convenience, and policy. 1. *Selwyn*, 542.

And this rule applies to all kinds of tenancy, whether for years, at will, or by sufferance. Now the defendant in this case must be considered as a tenant. When she entered, it was by virtue of the lease to her husband: she was then by law identified with him: they were one. If the term was unexpired at his death, it would enure to the benefit of the estate of the deceased. But suppose she was not technically a tenant; the point cannot be disputed, that any one who goes into possession by permission of another, whether as tenant or otherwise, must restore such possession: and this results from the principles of justice, as well as the rules of policy, and I think was decided in the case of *Wilson* ads. *Weathersby*. (a) There the defendant, who had been a tenant, went out of the possession for a time and returned again. It was contended, that under these circumstances, he ought not to be considered as a tenant, and that the rule could not apply to him. But, Mr. Justice Cheres, who delivered the opinion of the court, observes, "that the ground was founded on a misconception of the principle, which is not confined to cases of tenancy, in the common acceptation of the term. These cases have only furnished examples of the application of the principle, which is, that wherever a defendant has entered into possession under the plaintiff, he shall not be permitted, while he remains in possession, to dispute the plaintiff's title. He has a right to purchase any title he pleases, but he is bound, bona fide, to give up possession and to bring his action to try title," and he refers to 6 *Johnson*, 34, *Jackson*, ex. dem. *Smith* vs. *Steward*. 2. *Binney*, 471, *Galloway* vs. *Ogle*. The same position is laid down in *Richardson*, vs. *Broughton*, 2. *Nett* and *McCord*, 417.

(a) Reported in note, 1. *Nett* and *McCord*, 373.

CROXTON, & Co. vs. ADDISON. GAINS, vs. DOWNS.

It was said however, that the defendant's husband, had taken a lease from Green, after he went in under the plaintiff, and that she must therefore be considered as holding from Green. But this would be permitting her to commit a fraud for the benefit of another, which she would not be permitted to commit for her own benefit. The same principle which prevents her from setting up a title in her self, will prevent her from aiding another in doing so.

The motion is dismissed.—*Huger, Johnson, Nott and Richardson*, Justices, concurred.

E. CROXTON & Co. vs. THOMAS ADDISON.

IN this case the declaration claimed four hundred and seventy-six dollars fifty-seven and three quarter cents, and the verdict was for nine hundred and one dollars. In such case, judgment cannot be entered up for the verdict, and a venire facias de novo must be ordered, unless the plaintiff remit the excess beyond the sum claimed in the declaration. But as it appeared that the defendant had a discount, to a large amount, which he was obliged to withdraw on account of the absence of his witness, and therefore the plaintiff could not with safety enter a remittitur, and a new trial was ordered with leave to the plaintiff to amend his declaration, and to the defendant to plead his discount. *Mooney, vs. Welsh*, 1 *Con. Rep.* 133; *Brown, et. al. vs. Gibson*, 1 *Nott & M'Cord*, 326; *Givens, vs. Porteous*, 1 *M'Cord*, 379.

IONADAB GAINS, vs. SAMUEL DOWNS.

Action on the case. The defendant, a sheriff, levied an execution of the plaintiff against one K. on property which he left in K's possession, who left the state with it and failed to produce it on the day of sale. It was shewn in defence, that there were in defendant's office, executions against K. older than the plaintiff's, which would have taken the whole of the proceeds, if the property had been sold. Held that the plaintiff had sustained no injury, and was not entitled to recover.

It appeared in evidence in this case, that the plaintiff had recovered a judgment against James Kendrick, on which he

GAINS, vs. DOWNS.

had sued out execution, which was placed in the hands of the defendant, who was then sheriff of Lauren's district. He levied on a wagon and three horses, but suffered them still to remain in the hands of Kendrick, to be produced when he should require them. Kendrick, however, instead of producing them on the day of sale, took a load of flour and went off to Augusta, and never returned. The defendant alleged, by way of defence, and actually proved, that there were older executions in the office, to a greater amount than this property was worth, which would have taken the proceeds, if the property had been sold, and that the plaintiff, therefore, had sustained no injury. The testimony was left to the jury, with instructions from the court, that if they were of opinion that the older executions would have swallowed up the whole of the property, had it been sold, so that there would have been nothing left for the plaintiff, that he suffered no injury and was not entitled to recover. The jury appeared to be of that opinion, and found a verdict for the defendant.

A motion was made for a new trial, on the ground of misdirection of the court.

The opinion of the Court was delivered by Mr. Justice Nott.

There is no doubt but that the defendant laid himself liable to an action, by his misplaced confidence in Kendrick, whose property he had taken in execution. But he was only liable to them who were injured by his neglect. Indeed, it can scarcely be called neglect; it is rather a legal responsibility, which he has incurred by the misconduct of an agent, who had betrayed his confidence. There can be no question, but that when a sheriff takes property in execution, he may place it in the hands of an agent to keep, subject to his order. And if he thinks proper, he may employ the party himself for that purpose. It affords him an opportunity of indulging toward an unfortunate debtor the benevolent feelings of which those clothed with a little authority, are too often unmindful. It saves to the debtor the expense which he might otherwise incur. It allows him the enjoyment of the property, until the time shall arrive, when perhaps he will have none to enjoy; and it may even afford him the means of paying the debt, without such

BRENNAN & M'CREARY, vs. M'LAMORE.

a sacrifice. The sheriff is, however, responsible for the conduct of his agent; but he is not answerable to every man in the community, it is only those who have been injured to whom he is amenable. The plaintiff has been no sufferer, and therefore can maintain no action.

The motion is refused. *Colcock, Richardson, Johnson, Gantt*—Justices concurred.



BRENNAN & M'CREARY, vs. BURRELL M'LAMORE.

Writ of attachment issued in the name of D. Brennan. Order by the court, that "Brennan & M'Creary, plaintiffs in attachment," have leave to file their declaration. Declaration filed in the names of Brennan & M'Creary, set aside for the irregularity.

It appeared in the case, that a domestic attachment had been issued, at the instance of Dannel Brennan, against the effects of Burrell M'Lamore. At the spring term, 1823, a motion was made, on the part of the defendant, to have that attachment set aside, on account of some irregularity, and the property attached, delivered up to the defendant. That motion was overruled.

An order was then obtained, that the plaintiff have leave to file his declaration. The order was drawn up in the name of *Brennan and M'Creary*, and not in the name of *Daniel Brennan*, and entered in the minutes of the court in that form. A declaration was accordingly filed, in the name of Brennan and M'Creary, against Burrell M'Lamore. At a special court, held in July following, a motion was made to set aside that declaration for irregularity; which was granted:

And this was a motion to reverse that decision, on these grounds:

1st. Because the proceedings were regular, and ought to have been supported.

2d. Because the court refused to permit the plaintiff to amend the declaration, by substituting the names of Brennan and M'Creary, in the place of Daniel Brennan.

3d. Because the order of the preceding court authorized

BRENNAN & M'CREARY, vs. M'LEMORE.

the plaintiff to file a declaration in the name of Brennan and M'Creary.

The opinion of the Court was delivered by Mr. Justice Nott.

There is no rule of practice better established than that the declaration and all the subsequent proceedings must be carried on in the name of the original parties to the suit. Indeed the declaration is defined to be "an exemplification or exposition of the original writ, on which it is founded." The plaintiff might as well have filed his declaration in the name of any other person, as in the name of Brennan and M'Creary. It does not even appear that the person who constituted one of the firm of Brennan and M'Creary, was the same Daniel Brennan, who sued out the original writ; and if it did, it would not have cured the irregularity.

The court did not refuse to let the party amend his declaration, so as to make it conformable to the original writ. But the amendment proposed, was, to permit him to carry on the proceedings, in the form in which they then presented. But that would not have been an amendment; it would have been a substitution of new parties and new proceedings.

With regard to the third ground, it did appear on the minutes of the court, that "Brennan and M'Creary," had leave to file a declaration. But *Daniel Brennan* could derive no benefit from that order. In fact, no such order was ever made. The plaintiff in attachment, had leave to file his declaration. But that was only an authority to go on with the proceedings which he had commenced, and not to substitute others in their stead. A judge on the circuit, in the hurry of business, seldom attends to the phraseology of every formal order: and it would be a lamentable defect in our system of jurisprudence, if one could not be arrested, which had been entered by mistake.

Much less would the court sanctify an error, by giving effect to one, contrary to its legal import.

The motion is refused.—*Huger, Johnson, Calcock and Richardson*, Justices, concurred.

HUGH M'MULLEN, & wife, vs. JOHN BROWN.

Office copy of a deed to R. C. under whom plaintiffs claimed, executed in 1768, and soon after recorded, was properly admitted in evidence, upon proof that search had been made among the papers of R. C. and in the office where the deed was recorded; and that R. C. and those claiming under him, had been in possession of the land conveyed ever since.

Testator, by his will, gives land to his son "and his heirs forever." A tract of land to his daughter "and her heirs forever." And the will goes on to give to the son and daughter, jointly, and their heirs, four slaves; "the said negroes not to be divided till the said W. M." (the son) "arrives to the age of twenty-one years. If either of the said" (son or daughter) "shall decease before the age of twenty one or marriage, leaving no heir lawfully begotten, the moiety of the deceased shall revert to the survivor; if both shall decease, leaving no heir as above mentioned, then the said property shall revert to my father." Held that the limitations related only to the slaves.

A tract of land was granted to the father of testator's former wife, in 1794; which testator acquired by his marriage. Testator afterwards purchased a tract of land, held by an older grant, which was said to cover part of the same land. He devised to his daughter, T. "two hundred and sixty-one acres" "being land given to him with his former wife." More than 261 acres was included in the tract which testator acquired by his wife, independently of what was covered by the older grant. Held that T. took no part of the land which was within the older grant.

THIS was an action of trespass, to try titles to a tract of land, claimed by the wife of the plaintiff, as heiress to her two children, William M. McDonald and Charlotte E. McDonald, devisee of William McDonald jun. deceased. The defendant claimed in right of his wife, formerly Thirza McDonald, daughter of the same Wm. McDonald, jun. by a former wife, and devisee under the same will.

The plaintiff produced a grant to James Wahab, for two hundred and fifty acres, dated March 1755. He next produced the office copy of a deed from the grantee to Robert Crawford, dated May 1768. An objection was made to the admission of the copy in evidence, until the existence and loss of the original should be proved. The plaintiff proved that search had been made among the papers of Robert Crawford; and in the office where the deed appeared to have been recorded shortly after its execution.

M'MULLEN, *vs.* BROWN.

It was also stated that the plaintiff held a deed from Robert Crawford to Wm. M'Donald, under whom they claimed, by virtue of which he had gone into possession, which possession had been continued by him, and those holding under him, up to the present day. The court permitted the copy to be read,

The plaintiffs then gave in evidence the deed from Robert Crawford to Wm. M'Donald, jun. and lastly, the will of Wm. M'Donald, jun. by which he had devised the land in question to Charlotte E. M'Donald. It was admitted that Wm. M. M'Donald and Charlotte E. M'Donald, were both dead, and that plaintiff's wife was their heiress at law. But it was contended that the land was limited over, upon the death of the devisees, to Middleton M'Donald, sen. and therefore plaintiff's wife could not inherit. Her right depended, therefore, upon the construction of that will. The clauses of the will in question, were in the following words, "I give and bequeath to my son, William M. M'Donald, four several tracts of land (describing them) to him and his heirs forever. Item, I give and bequeath to my daughter, Charlotte E. M'Donald, all the remainder of my lands, of which I gave my daughter Thirza M'Donald two hundred and sixty-one acres, it being the lower part of said lands, to her and her heirs forever. Item, I give to my two last mentioned children, William M'Donald and Charlotte E. M'Donald, the following four negroes, Tuff, Dinah, Fan and Sam, son of Fan, to them and their heirs forever. The said negroes not to be divided, till the said William M. M'Donald, arrives to the age of twenty-one years. If either of the said Wm. M. M'Donald and Charlotte E. M'Donald, decease before the age of twenty-one years or marriage, leaving no heir lawfully begotten, the moiety of the deceased shall revert to the survivor. If both shall decease, leaving no heir, as above mentioned, then the said property shall revert to my father, Middleton M'Donald, sen'r. and his heirs forever." The legatees both died before the age of 21 or marriage. The presiding judge held that the limitation extended only to the negroes mentioned in the Will and not to the land.

Defendant's wife, claimed under a clause of the same Will, which was in the following words: "I give to my daughter Thirza M'Donald, two hundred and sixty-one acres of land; to

M'MULLEN, vs. BROWN.

be taken off of the upper end of the plantation or tract of land, where I formerly lived, being land given to me in marriage, with my former wife, &c." A part of the land so devised, was contained in a grant to Wm. M'Donald, sen'r. the father of testator's wife, dated in the year 1794. The defendant admitted that he was in possession of a part of the land claimed by the plaintiff; but he contended that it was covered by the grant of 1794, to William M'Donald, sen'r. and therefore part of the land which the testator acquired by his wife; and that as the testator had given to defendant's wife, all the land which he had acquired by her mother, and left to Charlotte, under whom plaintiffs claimed, the remainder of his lands only, the defendant was entitled to hold to the extent of his grant, although the plaintiff held under an older grant. The presiding judge, instructed the jury that it was not material to enquire whether any part of the junior grant, under which defendants claimed, was located within plaintiffs lines or not; for in any event, the plaintiffs title under the elder grant must prevail.

The jury found a verdict for the plaintiff.

This was a motion for a non suit, on the ground that the copy deed from Wohab to Robert Crawford, ought not to have been admitted in evidence.

And for a new trial, on the grounds;

1st. Because the court charged the jury, that the clause of limitation in the will, did not extend to the land.

2d. Because the court charged the jury that it was not material where the defendants land should be located, as the elder title must prevail.

The opinion of the Court was delivered by Mr. Justice Nott.

That the copy of a deed ought not to be read in evidence, until the existence and loss of the original have been established, has not been left to be settled at this late day. But I do not know that it has yet been determined, and perhaps it cannot be by any definite rules, what shall in all cases be sufficient evidence of those facts to let in the secondary evidence. They may be proved by positive testimony, or inferred from circumstances. In the present case, more than half a century had

M'MULLEN, vs. BROWN.

passed away since the deed had been executed and recorded: All the parties and witnesses were dead. The testator and those claiming under him had been in possession about twenty-five years. The fact of the deed having been recorded immediately after its execution, repelled every idea of fraud. Under such circumstances, the cause ought to have gone to the jury, who might, and I think ought, to have presumed a conveyance, even though no copy had been produced.

The motion for a non suit cannot prevail.

The first ground for a new trial depends upon the construction of the will of Wm M'Donald, jr.

The testator makes a specific devise of land to his son, Wm. M. M'Donald, in fee-simple, without any condition or limitation. He then makes a specific devise of other lands to his daughter, C. E. M'Donald. He then gives them certain negroes, jointly, with cross remainders over to the survivor.

His words are, "if either of the said Wm. M. M'Donald and Charlotte E. M'Donald, should decease, before the age of twenty-one years, &c. the moiety of the deceased, shall revert to the survivor." Now, what is meant here by the moiety? why most unquestionably, a moiety of the property which was given to them jointly; which was the negroes only. They did not hold the land in moities, but each held by a specific devise. If he meant the land, then he devised a moiety belonging to each, and left the other moiety undisposed of in the limitation clause, which would be inconsistent with all the other provisions of the will. He then goes on to say, "if both shall decease, &c. then the *said* property shall revert to my father, &c." The question may then be asked, what said property shall revert? The answer is very plain: The same property which was before limited to the survivor, in case they should both die before the age of twenty-one or marriage, and no other.

The second ground for a new trial, does not appear to me to present a greater difficulty than the first.

The testator devises "to his daughter, Thirza M'Donald, two hundred and sixty-one acres of land, to be taken off of the upper end of his plantation, being land given to him with his former wife."

WIGGINS, vs. HUNTER.

Now the devisee is either entitled to two hundred and sixty-one acres, without regard to the quantity received by him with his former wife, or she is entitled to all that he did receive by his former wife, be the same more or less. If the former be the correct construction, she has received, without interfering with the claim of the plaintiff, upwards of one hundred acres more than is devised to her. If the latter, then we must enquire how much he did receive with his wife. It will be observed, that when the testator received this land by his wife, the land claimed by the plaintiff's belonged to Robert Crawford: He therefore received by his wife, that part only, which was within the Wahab grant.

For as the grant to Wm. McDonald, was of a much more recent date, than that to Wahab, it was void as to all that part which fell within it; if indeed any part did fall within it, which was very doubtful; and he could derive no title from his wife to land to which she had no title herself. It is true, he afterwards purchased from Crawford, still it was not *acquired by his wife*; and therefore not embraced in the devise to her daughter.

The motion therefore must be refused.—*Nott, Huger, Johnson, Richardson and Gantt*, Justices, concurred:



B. WIGGINS, vs. D. H. HUNTER.

Action for the breach of warranty of the soundness of a horse, for the purchase money of which a negotiable note had been given. Held that the action might be maintained, though the note had not been paid.

THIS was an action for a breach of warranty of the soundness of a horse. It appeared that the plaintiff had given a negotiable note for the purchase money, which had not been paid, and which still remained in the hands of the original payee. The presiding judge held, that the action could not be maintained, as the plaintiff had not paid the money. The plaintiff, therefore, suffered a nonsuit, *with leave to move this court to set it aside.*

A motion was now made for that purpose.

The opinion of the Court was delivered by Mr. Justice Nott.

BROWN, *vs.* FAUSSET.

If this had been an action for money had and received, perhaps it could not have been maintained, because no money had been paid. But the question was, whether there had been a breach of warranty, if so the right of action had accrued. If the horse was unsound, the warranty was broken. Whether the money was paid or not was perfectly immaterial, so far as regarded the right of action. The warranty on the one hand, and the promise to pay the money on the other, were mutual and independent contracts, founded on the consideration of mutual promises.

At common law, each party must have brought his action. It is only by an act of the Legislature that one could have been set off against the other. But the right to bring mutual actions is not taken away. How far the circumstance of the money not having been paid might have gone to mitigate the damages, it is not now necessary to inquire. But I doubt very much whether it could ever have had that effect: For the plaintiff had given a negotiable note, which might at any time have been transferred to other hands, and might, therefore, be regarded as an actual payment. It is not necessary, however, now to determine that question. I think the plaintiff was entitled to his action.

The motion, therefore, must be granted.—*Hüger, Johnson, Colcock, and Richardson*, Justices, concurred.

VINCENT BROWN, *vs.* JOHN FAUSSET, and others.

Defendant applies to plaintiff, to borrow money, who has none, but offers him a note for seven hundred dollars, on a third person, whom he understood to have cotton ready to pay it. Plaintiff accepts it, and gives his own note for seven hundred and seventy dollars, payable at the end of a year: Held Usury.

It appeared in evidence, that John Fausset, who was the principal in the bill, being about to enter into business, applied to the plaintiff to borrow money. He had no money to lend, but having a note on Biggins Mobley, for seven hundred dollars, and understanding that Mobley, had cotton enough to pay it, he offered to transfer to the defendant that note, and to take his note, with security for the same amount, payable one year

BROWN, *vs.* FAUSSET.

after date, upon condition he would pay him ten per cent for the indulgence. The terms were accepted, and the note or bill in question was executed for seven hundred and seventy dollars. The seventy dollars being added by way of interest for the forbearance of one year.

The jury, under the charge of the court, found a verdict for the defendant.

This was a motion for a new trial, on the ground, that the evidence did not support the plea.

The opinion of the court was delivered by Mr. Justice Nott.

It has been laid down in the course of the argument as a settled principle, that it is not usurious to purchase a note at a discount, if done in the ordinary course of business. So on the other hand a person may give a premium for one, without incurring the penalty against usury. Thus for instance to give the depreciated bills of a bank in bad credit for those of one in good credit, at the rate even of two for one, would not be unlawful. Neither would a similar exchange of the paper of two individuals. These positions I take to be unquestionable, and so the jury were instructed in this case. But it is impossible not to see that this is not a case of that description: The plaintiff transferred a note to the defendant for seven hundred dollars, payable by a man, who it was known had cotton ready to give in payment of it. In return he received a note payable one year after date, on which it was expressly stipulated that he should receive ten per cent for that year's indulgence. It was therefore precisely the same as if he had sold him so much cotton on a credit of one year, receiving interest at the rate of ten per cent.

Suppose the plaintiff had given the defendant a bank check for seven hundred dollars in exchange for his note, for seven hundred and seventy; or had given him an order on any individual, for so much money, or for goods to that amount. It would have been an exchange of one species of paper for another; yet I apprehend that there can be no doubt but that it would have been usury. And what was the transfer of Mobley's note, but an order to pay so much money. In all cases of this description, it must be a question whether it was a bona fide purchase, or a mere shift to evade the act.

FARRAND, vs. BOUCHELL.

And that was a question for the jury to determine. The testimony to be sure, was so clear that there was little room left for the exercise of their discretion. The court therefore ran no risk in telling the jury that they ought to find for the defendant: For when the facts are clearly proved, the conclusion is a matter of law for the determination of the court. The court is satisfied with the verdict and the motion is therefore refused. *Johnson, Colcock & Richardson, Justices, concurred.*

D. R. FARRAND, vs. J. C. BOUCHELL.

Where defendant submitted the usual affidavit for a continuance, on account of the absence of witnesses, his daughters, and plaintiff offered to admit as their testimony, whatever defendant would state that they would prove; the court presuming that plaintiff must know what his daughters would prove, ordered on the case for trial: and new trial for this cause refused.

Motion for continuance being generally a matter of discretion, depending on its peculiar circumstances, can seldom be the ground of a new trial.

Interest is not allowed on a demand for work or labor done, goods sold, or any other account not liquidated in writing, even though the money be payable at a day certain.

In no case where the action of assumpsit is for work and labor, &c. where the nature of the contract furnishes the standard of assessment, can the jury allow arbitrary damages.

It appearing in evidence that the defendant being about to build a house and the necessary out-buildings, wrote to his friend in New York to procure him a good mechanic to undertake the work. The plaintiff agreed to undertake, provided he could be made sure of a job which would justify him in going such a distance from home, and subjecting himself to such inconveniences as he must necessarily incur by such an undertaking.

The defendant then sent on a description of the dwelling-house and other buildings which he wished to have erected. The plaintiff agreed to undertake the work, and to bring with him two apprentices, upon the condition that the defendant would pay him three dollars per day, (his wages to commence from the time he left home,) pay his expenses out, and find him

FERRAND, vs. BOUCHELL.

during the time he should be engaged in the work. These terms were acceded to on the part of the defendant. The plaintiff commenced the work and proceeded with it until some of the out-buildings were completed and the dwelling-house nearly finished. Some difference then took place between them, and the plaintiff left his employment. The defendant consented to dispense with his further services, provided he would finish the dwelling-house. The plaintiff alleged that the materials were not furnished; and it was very clearly proved that all the materials were not provided; but whether there were enough to enable him to go on with the work until the others were provided, did not very satisfactorily appear.

In addition to the demand for labor, pursuant to the terms of the original contract, there were some other small items for money lent, extra work, &c.

The defendant set up a discount for a medical bill and attendance on the plaintiff and his apprentices while sick, and some other services rendered him, and some small articles delivered in payment. It was also contended that the work was not well done, and that the plaintiff had forfeited his claim by abandoning his work before it was finished; or, at least, if the plaintiff had not forfeited his whole claim, the defendant was entitled to a deduction for the damages which he had sustained by such breach of contract. When the cause was called for trial, the defendant moved to postpone it, on account of the absence of two of his daughters, who it was alleged, were material witnesses, and were necessarily absent. The plaintiff, however, agreed, that if the defendant would state upon oath what he expected these witnesses to prove, he would admit that they would swear to the facts so stated, and that it should have the same effect as if the witnesses themselves deposed to the same in court.

The cause was then ordered on for trial. On the part of the plaintiff it was contended, that he was not only entitled to recover the amount of his demand for work and labor performed, but that he was also entitled to interest upon it, and damages for his expenses in attending court, for delay, loss of time, &c.

The court instructed the jury, that the plaintiff was entitled to recover according to the original terms of the contract,

FERRAND, vs. BOUCHELL.

but that neither interest nor damages had ever been allowed in this state on demands of this sort. But that if they were of opinion the plaintiff had abandoned the work without any just cause, and that the defendant had been injured thereby, they might deduct from the value of the work the amount of damages which they supposed he had sustained. The other items, both on the part of the plaintiff and defendant, were left to the consideration of the jury.

The jury found a verdict for the plaintiff for one thousand eight hundred and forty-one dollars fifty-four cents. (\$1841 54.)

From the several items of which the plaintiff's demand was composed, it was apparent that the jury allowed the whole demand, except the interest; and that they allowed \$357 by way of damages.

A motion was now made for a new trial, on the following grounds:

1. Because the defendant was ruled to trial, contrary to the rules and practice in the continuance of causes.

2. Because the jury allowed damages, contrary to the established principles of law.

3. Because many items of the defendant's discount were disallowed, to which he was entitled.

4. Because the verdict was contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice Nott.

The various shifts to which a party will frequently resort to effect the postponement of a case; the perseverance with which one will press for a trial when he finds his antagonist unprepared; the zeal with which the counsel enter into the feelings of their clients, and the difficulty of getting at the truth when each party is determined to take all advantages of the other, which circumstances may throw in his way; all combine to render a question of postponement one of the most difficult and embarrassing that we meet with in the administration of justice. And although there are certain general rules by which courts are usually governed; yet among the infinite variety of circumstances which contribute to render a case an exception to the general rule, almost every one may be resolved into a question of discretion, which must be governed by its own

FERRAND, vs. BOUCHELL.

particular circumstances. And there would be no end to delay, if the court were not permitted to exercise a liberal discretion in laying the parties under such reasonable terms as are calculated to facilitate the progress of a suit and to promote the ends of justice. In the present case, the witnesses were the defendant's own daughters. That circumstance alone was calculated to excite suspicions that he had not used all the diligence that might have been employed to procure their attendance. It certainly cannot be believed that he did not know what they could prove. But even that was not required of him; he was only required to state what he expected to prove by them, and that was to be received as if it was actually proved. And surely a person can have no cause to complain when his rights are to be determined on a statement of facts made out by himself. A question of postponement most generally depends so much upon the discretion of the court, that it can seldom afford a ground for a new trial; and the court do not see that such extraordinary rigor has been used on this occasion, as to render this case an exception to the general rule.

With regard to the second question, I could never see any good reason why interest should not be allowed on an account for work and labor done, or goods sold and delivered, or on any other open account, where the money is withheld after time of payment is past. But the law appears to be otherwise settled. In the case of *Alexander Knight vs. Thomas R. Mitchell*, 2d Treadway Rep. 668, it was decided, that the plaintiff, who had been the defendant's overseer, was not entitled to interest, although the defendant had agreed to pay a stipulated sum at the end of the year. And that opinion seems to be conformable with the English decisions on the same question. For although it might be inferred from the observations of Lord Ellenborough, in the case of *De Havilland vs. Bowerbank*, 1 Campbell, 50, that interest ought to be allowed in all cases where there is a contract to pay money on a certain day; yet, in the case of *Gordon and others, vs. Swan and others*, 2 same 429, 430, his Lordship observes, that what he said in that case must be taken to refer to *written instruments*, such as promissory notes and bills of exchange, which are there put as examples;

See also, *N. Goodard, ads Chas. & John J. Bulow*, 1 *Nott & M^c Cord*, 44.

It does not appear, however, that the jury have taken the interest as the measure of damages in this case, but that they have allowed an arbitrary sum to double that amount. There is no doubt that damages, at the discretion of the jury, may sometimes be given in an action of assumpsit: As where the action is founded in fraud or deceit; or when a party fails to perform a contract, by which the other party sustains a special damage; or where it is so badly performed as to frustrate entirely the expectations of the party for whose benefit it was intended. As if the plaintiff, in this instance, had failed to perform any part of his contract, by which the defendant had lost the materials which he had provided for that purpose, or had done the work in such a manner that the house had been unfit for habitation. But in no case where the action is for money had and received, goods sold and delivered, or for work and labor performed, which, from the nature of the contract itself furnishes the standard of assessment, are the jury allowed to give more than the amount received, with interest, or the value of the articles delivered, or the services rendered. *Rose & Rodgers vs. Beatie*, 2d *Nott & M^c Cord*, 538.

The other grounds involved questions peculiarly proper for the consideration of the jury, respecting which the court do not see any reason to be dissatisfied. A new trial, however, must be granted, on the second ground; unless the plaintiff will remit the sum of \$357, which the jury have given as damages; in which case the motion is refused.

Huger, Johnson, Colcock, Richardson, Gantt, Justices, concurred.

THE STATE OF SOUTH CAROLINA, *vs.* JOHN H. HARRISON.
THE SAME *vs.* GEORGE SEABORN.

The Legislature may constitutionally impose a rate of interest, higher than the rate generally established, on tax collectors who fail to pay over public monies in their hands, at the times required by law.

This increased interest is not in the nature of a penalty: and the sureties of tax collectors are liable for the payment of it.

THESE actions were brought against the defendants as the securities of James M'Daniel, late tax collector of Greenville district, on the bond for his faithful performance of the duties of that office. The defendants pleaded no plea, and the cases went to the jury on a writ of inquiry. The default alleged against the tax collector was, the not paying over to the treasurer a large amount of money collected for the taxes of Greenville district, for the year 1821. The act to raise supplies, of December, 1817, requires a defaulting tax collector to pay fifteen per cent. interest on all monies in his hands, which he neglects to pay over at the time required by law. And a similar clause is contained in the several tax acts until December, 1822, when the rate was increased. The bond is dated the 4th day of January, 1819. A doubt being suggested by the counsel of the defendants, whether the securities could be made to pay interest at the rate of fifteen per cent., the following special verdict was found, by consent, in both cases, viz. "We find for the plaintiff the sum of two thousand seven hundred and fifty-one dollars eighty-five cents, with interest at the rate of fifteen per cent., from the 3d day of June, 1822, if the court shall be of opinion that the plaintiff is entitled to that rate of interest; if not, then we find for the plaintiff the same sum, with interest at the rate of seven per cent. from the same date.

A motion was now made by the solicitor, for leave to enter up judgment for the state, for the sum so found by the jury, with interest at the rate of fifteen per cent., from the third day of June, 1822.

The opinion of the Court was delivered by Mr. Justice Nott.

The act to which we are now called upon to give construction is in the following words—"If any tax collector within this state shall neglect or refuse to make his return, and pay the taxes received by him within the limit prescribed by law, it shall be the duty of the treasurer, and he is hereby required

THE STATE, vs. HARRISON. SAME, vs. SEATON.

in addition to the coercive power which he now possesses, to charge the said tax collector with interest at the rate of fifteen per cent., from the time he ought to have made such return, and paid such taxes to the time of such settlement."

These cases have been submitted to us without argument on the part of the defendants. We are, therefore, uninformed of the grounds on which they claim exemption from the requisites of the act. The counsel on the part of the state appears to have anticipated two grounds of defence.

1. That the Legislature cannot prescribe a different rate of interest, in cases of debts due the state, from those due to individuals.

2. That the fifteen per cent., required by the act to be paid must be considered in the nature of a penalty imposed upon the tax collector for neglect of duty, and, therefore, cannot be extended to his securities.

I have no doubt but that the Legislature are competent to regulate the rate of interest, both with regard to debts due the state and individuals, in any manner they may think proper; and that they may vary the rates according to the nature of the debts, without any violation of their constitutional powers. And I have as little doubt that such a distinction might have a salutary influence on the conduct of attornies, executors, and guardians, and all public officers who neglect to pay over monies in their hands at the times required by law. A want of promptitude in the discharge of those duties is an evil which calls loudly for redress. And in no case can it be more necessary than that of a tax collector, upon whose punctuality the fiscal operations of the government so much depend. I have no doubt, therefore, either of the constitutionality or policy of the measure.

If it was a penalty imposed upon the tax collector for neglect of duty, I should be of opinion it could not be visited upon his securities. But it is only an increased rate of interest which he is required to pay for the use of money belonging to the public. And whatever he is liable to pay, falls upon his securities in case of his default, by the very nature of their undertaking. And they can have no cause of complaint; for they may relieve themselves from the interest at any time, by paying up the principal. The motion must, therefore, be granted.

Grant, Johnson, Coleock, Justices, concurred.

CONSTITUTIONAL COURT,

CHARLESTON,
JANUARY TERM, 1824 }

JUSTICES PRESENT.

E. H. BAY,	D. JOHNSON,
C. J. COLCOCK,	J. S. RICHARDSON,
ABM. NOTT,	D. E. HUGER,
RICHARD GANTT.	

THE STATE, vs. THOMAS CROSBY.

The jurors, by whom the prisoner was tried, were regularly drawn, according to the provisions of the act of assembly, and summoned by the sheriff. But no writ of venire had been delivered to him, as the act directs, until after the jury had been summoned. Held no cause for arresting the judgment.

THE prisoner was tried and convicted on an indictment for horse-stealing; and this was a motion in arrest of judgment, on the ground, that the jury by which he was tried, were improperly and illegally summoned by the sheriff of the district. The jury had been regularly drawn at the preceding term, and their names enrolled on the journals of the court, from which the sheriff had procured a list, by which he made out summonses, which were regularly served; but the clerk had neglected to furnish the sheriff with the writ of venire, required by law, until a few days before the sitting of the court, and after the jury had been summoned; and the circumstance that the venire was not in the hands of the sheriff, when he summoned the jury, was the sole foundation of the present motion.

The opinion of the Court was delivered by Mr. Justice Johnson.

The act of the legislature, prescribing the mode of drawing and summoning jurors, provides, that the clerk shall enter the names of the jurors drawn, to serve at the succeeding term, in

THE STATE, vs. CROSBY.

a pannel or column of the session's book, which he is required fairly and exactly to transcribe and annex to the writ of venire; to be by him forthwith delivered to the sheriff, (*vide Public Laws*, 124, s. 4.) and the omission of the clerk to deliver the venire to the sheriff forthwith, is the foundation of this motion. All must admire the beauty and wisdom of a system calculated like ours to secure a fair and impartial trial by jury; and it is, perhaps, amongst the first duties of this court, to guard it with the utmost vigilance. But I apprehend that in this instance, there has been no violation of any of the provisions calculated to secure this object, and this conclusion, I think, must follow, if we recur to the circumstances. The jury by whom the prisoner was tried were regularly drawn at the preceding term, they attended the court and were sworn upon the trial, and, in any view, were the appropriate and legitimate triors of the prisoner, and as to him the end and aim of the law has been fully accomplished. But it is objected that the mode of summoning them has been irregular. The important object of obtaining an impartial jury is secured by the manner of drawing them, which is not affected nor controlled in the least by the mode of summoning them; and it is obvious that in prescribing the mode, the legislature had nothing more in view than to procure it to be promptly done. The writ of venire was the authority of the sheriff, and as the process of the court, secured the attendance of the jurors, I am unable to see how the prisoner is affected by an irregularity in this respect. It is not intended to dispense with the necessity or use of the writ of venire. On the contrary, I think that the clerk was criminally negligent, and deserves at the hands of the court the severest animadversion.

The motion is refused,—*Nott, Colcock, Richardson and Huger*, Justices, concurred.

Edwards, for motion.

The Attorney General, contra.

92 SOUTH-CAROLINA STATE REPORTS,

RICHARD H. JONES, *ads.* PHILIP S. POSTELL & JOHN POTTER,
Assignees.

Though tenant of fee simple conditional may, after the existence of issue, aliene; yet a devise is not an alienation within the meaning of the law. If such alienation do not take effect in the life time of the tenant, the estate must descend to the heirs of limitation, per formam doni.

THIS was an action of debt, on a bond, made by the defendant to the late general William Fishburne, and assigned by him to the plaintiffs. It was admitted on all sides that the bond was given as the price of a tract of land lying on the Horse Shoe, containing 500 acres, which was conveyed by general Fishburne to the defendant, in fee-simple, by deed bearing date the 1st. January, 1819. The defence relied on was, that general Fishburne had no title in the lands, and consequently could not convey, and that, therefore, the consideration of the bond had failed, and defendant was not bound to pay it. The merits of the defence depended on the legal deductions to be drawn from the following state of the facts:

Thomas Snipes was seized of the lands in fee, and by his will, dated the 18th July, 1757, devised the land in question to his son William Clay Snipes, "to him and the heirs of his body, forever;" and died shortly after. William Clay Snipes made no disposition of the land in his life time, but by his will, dated 5th September, 1805, he devised the said land to his daughter Mary Clay Fishburne, wife of William Fishburne, "to her and the heirs of her body for ever." William Clay Snipes died in the same year, shortly after his will was executed. He left several children and grand children, three of whom were under age, so that the estate was not affected by the operation of the statute of limitations. All the interest which general Fishburne had in the land, was derived from this devise to his wife, but she did not join him in the deed to the defendant, nor did she otherwise dispose of her interest in it during his life time, he having died before the commencement of this action. After the death of general Fishburne, and after the commencement of this action, but before the trial, Mrs. Fishburne executed and tendered to the defendant, a release of all her right, title, and interest in the premises, which he then refused to accept. She was also executrix to general Fishburne. The defendant also proved that

JONES, *ads.* POSTELL & POTTER

He had lost an advantageous sale of the premises, in consequence of the supposed defect in his title, and sustained thereby a positive loss of \$1000, and claimed at least a deduction of so much, if, in the opinion of the court, his title was perfected by the release of Mrs. Fishburne. A verdict was found for the plaintiff, under the direction of the court, for the whole amount of the bond; and on a motion made for a new trial, the following objections to the opinion of the presiding judge, growing out of the trial below, were submitted to the consideration of the court.

1st. That the court erred in charging the jury that William Clay Snipes, took such an estate under the devise from Thomas Snipes, as enabled him to dispose of the fee by will, whereas it was contended that he took only a fee conditional at common law, which he could not devise, although he had issue.

2nd. That the court erred in admitting evidence of the tender of the release by Mrs. Fishburne; because it was contended, first, that the contract between general Fishburne and the defendant being executed, could not be changed by the act of one of the parties. Secondly, because it was the deed of a stranger, not a party to the original contract. Thirdly, because it was not tendered until after the action brought.

3rd. Because the court erred in charging the jury that the release of Mrs. Fishburne perfected the defendant's title; and that, therefore, there was no evidence by which defendant's damages, if he had sustained any, could be ascertained.

4th. Because, in any event, the defendant was entitled to a deduction of \$1000, lost by an opportunity of selling, which was frustrated, in consequence of the existing defect in his title.

The opinion of the Court was delivered by Mr. Justice Johnson.

There can be but one opinion as to the character of the estate which William Clay Snipes took, under the devise from Thomas Snipes. The terms used, "to him and the heirs of his body for ever," are precisely those which Lord Coke, and on his authority, Sir William Blackstone define, as creating, at common law, a qualified or conditional fee. But there is much difficulty in ascertaining at this day all the properties of this estate; for, although its outlines are preserved, the estate itself having been entirely annihilated by the statute *de donis, &c.*

JONES, *ads.* POSTELL & POTTER.

traces of its peculiarities are to be found in the English books; and in our own courts the subject is so novel that I have not been able to discover that any question of the sort has ever occurred. It is scarcely possible that the question involved in this case should not have existed in a thousand instances; but the probability is, that in the astonishing spirit of liberality which pervades every rank of society, means have been found by which an amicable accommodation has been effected; although I have not been able to ascertain that any generally received rule of construction has prevailed.

We are, therefore, driven to the necessity of adopting a rule applicable to this abstruse subject, without any other aid than the glimmering lights furnished by the antiquated English authorities; and I feel all the responsibility of such an undertaking. If in the interpretation of this devise, we were to apply the broad rule, that the intention of the testator, to be collected from the plain and obvious meaning of the words, should prevail, the mind would not hesitate in the conclusion. Indeed, the import of the terms are so pointed, that it is difficult to render it more clear by the substitution of others. It is a clear expression of the will of the testator, that the son should take only a life estate, and that the heirs of his body should take an unconditional fee, and, in default of these, that the land should revert to the heirs general of the testator; and if the devise were permitted to take effect, unfettered by the arbitrary exceptions supposed to be authorised by the necessities of society, and which are avowedly predicated on motives of public policy, such would undoubtedly be the order of succession. But the inconveniences resulting from these limited and fettered inheritances, tending to perpetuity, so justly abhorred, induced the English judges, says Sir William Blackstone, 2 *Blacks. Comm.* 113-14. to invest the grantee of such an estate with the absolute fee, where it was possible, even by the most subtle finesse of construction; and proceeding on this principle, they determined that the birth of issue invested the grantee with an absolute or unqualified fee, for three purposes: First, to aliene; second, to forfeit; third, to charge with rent and the like.

JONES, *adv.* POSTELL & POTTER.

I have thought it necessary to premise thus much, less with a view to impugn the adjudications of the English courts, than to show that as great violence of construction has been used with respect to these grants, as is admissible under any circumstances; for, however strongly I might incline towards a construction calculated to promote a great public convenience, there is a point beyond which the cord will not bear straining. Extremes in any thing are unwise, and they too frequently produce the dreaded result, as is well illustrated by the history of these estates, as connected with the *statute de donis*. Influenced by the same motives of public policy, I am disposed to follow so high authority, as far as the landmarks are clearly visible; but beyond this, I think it unsafe to venture. It results from this view of the subject, that under this devise, William Clay Snipes had, after the birth of issue, the power of alienating the lands in question, and it is under this power alone, that Mrs. Fishburne can take under the devise to her; as forfeiture is unknown in this country, and she does not claim under a rent charge, or the like.

Alienation may be effected by devise; and when this question was first presented to my mind, its strong inclination was, that as one of the means, it was embraced in the power given to the tenant of a conditional fee, to alienate on the birth of issue; but I am satisfied on a more attentive consideration, that its meaning was intended to be restricted to alienation by deed. It will be recollected that if the devisee had died without having been divested of the estate, by some of the means authorized by law, it would have descended to the heirs of his body, and the devisee would have taken effect *per formam doni*. It is also clear that the devise could not take effect until after the death of the testator, so that the rights of the issue and the devisee devolved on them both at the same instant, and the question is, which of these is to be preferred. This proposition, I think, places the claims of the devisee in the strongest possible view, as it presupposes the power of the testator, in respect to the devise, equal to the legal operation of the terms, creating the fee conditional; and consequently their rights must be determined by the order, in point of time, in which the devise and the limitation over to the heirs, are to take effect.

JONES, *ads.* POSTELL & POTTER.

In this state of things, I think, the principle clearly is, that he shall take, who derives his title from the highest source; for, although an instant may, for general purposes, be regarded as indivisible, yet there are cases in which the law admits, from necessity, a priority even in those cases; as for instance, where a father was seized of lands, which would descend to an only son at his death, and both die so instantaneously that it is impossible to distinguish which was the survivor; there the heirs of the father would inherit in preference to those of the son; and this preference is given, because of the certainty that the father was seized, and the uncertainty whether the son was or not. (a) I have not been able to find any case in which the principle has been directly applied to the precise case under consideration; yet, I think, it is impossible to mistake its application, if we compare this estate with an estate held in joint-tenancy, to which it has been made to apply. These estates, though different in the manner of their creation and duration, and some of their properties, with respect to the powers which the tenants have over them are strikingly analogous. A joint-tenant, like a tenant of a conditional fee, may alien, forfeit, &c. Co. Lit. 180, a. and by

(a) Although the rule of the *civil law* is, that if father and son die at the same instant, so that it is impossible to distinguish the priority of either death, the father shall be presumed to have died first, as being conformable to the order of nature; yet it reverses its rule, for the purpose of giving effect to testamentary donations, depending on the condition of the father's dying without issue.

"Si Lucius Titius, cum filio pubere, quem solum testamento scriptum heredem habebat, perierit, intelligitur supervixisse filius patri, et ex testamento hæres fuisse; et filii hæreditas successoribus ejus defertur, nisi contrarium approbetur." 2 Domat, Book 2, Tit. 1. Sec. xi.

"We see also that in a like event of a father and son having perished together by shipwreck, or by some other accident; another law presumes, under another view, that the son did not survive the father. It is the case where a testator had required his heir to restore his estate, or part of it, or some particular thing, to another person after the death of this heir, if he should die without children. It is said in that law, that if the person who was charged with this fiduciary bequest, having only one son, this son and his father had died at the same time, by some accident, so that it was impossible to know which of them had survived, it would be presumed that the son had not survived, and that, therefore, the case of the fiduciary bequest had happened, the person who was charged with it having died without children; which would make the estate go to the person for whose benefit the fiduciary bequest was devised; whereas, had it been presumed that the son had survived, it would have made the case of the fiduciary bequest to cease; and the son having succeeded to his father, he would have transmitted the estate to his heir." *Ib.* xii.

JONES, *ads.* POSTELL & POTTER.

this means defeat the *jus accrescendi*; and yet Littleton says, that if one joint tenant, by testament, devise lands held in joint-tenancy, the devise is void; and the reason given is, that "no devise can take effect till after the death of the devisor, and all the land presently cometh by the law to his companion who surviveth;" and his commentator remarks, that Littleton, "by the words *post mortem* and *per mortem*," used in the text, "though they jump at one instant, alloweth priority of time in the instant, which he distinguisheth by *per* and *post*. And the reason of this priority is, that the survivor claimeth by the first feoffor, and therefore in judgment of law his title is paramount to the title of the devisee, and consequently the devise is void." According to this principle, Wm. Clay Snipes had, under the devise from his father, Thomas Snipes, after the birth of the issue, the power to alienate; but not having exercised it, by any of the means authorized by the principle, the devise to Mrs. Fishburne is void, and the land descended to the heirs of his body, *per formam doni*. (a) It follows that the defendant can take nothing

(a) In the argument of the case, (which the reporter did not hear,) it is understood to have been urged, that the act of 1791, for making distribution of the estates of intestates, who were seized in "*fee simple*," a *fee simple conditional* must be included under the general description, and distributable in default of the tenant's having made a disposition: at all events, after the performance of the condition, when the estate is said to become absolute.

To which it was replied, that this construction agrees neither with the letter nor spirit of the act.

Not with the letter; because when the words "*fee simple*" are used without qualification, they are understood to relate to *fee simple absolute*, in contradistinction to a base or conditional fee: nor does the estate become absolute upon the performance of the condition, except for the purposes specified. 2 Black. Com. 110, 111. Coke, commenting on Littleton, who had said, that before the statute *de donis*, all inheritances were *fee simple*, remarks, "here *fee simple* is taken in his large sense, including as well conditional or qualified, as absolute, to distinguish them from estates in tail, since the statute." He goes on to shew that the estate does not become an absolute *fee simple* by the performance of the condition; for if there be issue and no alienation, and the issue take *secundum formam doni*, he takes not an absolute estate, but subject to the same condition. If there be issue, and the issue die in the lifetime of the tenant, and before alienation made, the estate will revert. Co. Lit. 19.

The spirit of the act is equally opposed to this construction; for its whole scope and purpose was not to regulate the power of donors in limiting their estates, but to prescribe how they shall descend, when no disposition has been made.

If this construction be correct, there is no *fee simple conditional*; for the estate must always descend to the heirs general, (though collateral,) in default of disposition by the tenant.

JONES, *ads.* POSTELL & POTTER.

under the deed of Gen. Fishburne, or the release from his wife, but her undivided distributive share, as one of the heirs of his body, and that the object of the defendant's purchase is probably defeated, and consequently the bond on which the action is brought, is without an adequate consideration. The solicitude which the law expresses, to favor the claims of the tenant of a conditional fee, and to invest him with an absolute estate, in exclusion of the heirs, and of the possibility of its reverting to the grantor, has had its full share in the consideration of this question; but, I think, it has been already shewn, that more has already been done to effectuate that object, than can well be justified; and as much and as deservedly as entailments and per-

Or if it is only after the performance of the condition, that the estate becomes subject to the provisions of the act; then, though there should be no alienation, and the issue should die in the lifetime of the tenant, there would be no reverter: the estate must descend as *fee simple*.

If the legislature had intended to effect these objects, unquestionably the intention would have been more plainly expressed.

If after the existence and death of issue, the tenant should aliene, the estate would, at common law, revert upon the death of the tenant. How would it be under the statute? There is certainly nothing in the statute to give the alienee an absolute estate in this case. Would it revert? Would it descend?

The argument drawn from the act of 1791, seems merely verbal.

Our law on this subject then, is the English common law, before the statute *de donis*. Before that statute, the question could not have arisen, because lands were not devisable. If the statute *de donis* had not intervened, the question involved in this case must have been made in the English courts, upon the passing of the statute of wills, 32, Hy. 8, C. 1.

By that statute, "estates of inheritance" were made devisable.

A doubt seems to have arisen whether these words, "estate of inheritance," might not include a fee tail; and by the stat. 34 and 35. Hy. 8. C. 5. they were explained to mean estates in *fee simple*.

Our act of 1734, (P. Laws, 138,) recognizes the statute of wills, and provides that persons having any estate or interest, *in fee simple*, in lands or tenements, may devise. If a *fee simple conditional* may be alienated by devise, it must be under the authority of these statutes. The act of 1734 seems to be consistent with, and to give construction to the act of 1789, authorizing persons having *right or title* to lands, tenements, or hereditaments, to devise. The question then is, whether the English statute of wills, or our own act, which is in the same terms, authorizes this sort of alienation.

All the arguments used with respect to our own statute of *descents*, apply to the construction of these. And the English courts appear to have decided the same question, or perhaps a stronger case, in the instance referred to in the opinion of the court—that estates in joint-tenancy are not devisable; *though held in fee simple*.

JONES, *ads.* POSTELL & POTTER.

petuities are abhorred, I think it safer to submit to them than for the court to change the old, or establish a new rule. (a)

(a) The reporter is indebted to a friend for the following note:

Tenant in tail, by bargain and sale, lease and release, covenant to stand seized, &c. conveys to another and his heirs: the grantee has a *base fee simple*, determinable on the death of tenant in tail, by the entry of the issue in tail; and until it be so determined, such estate has *all* the incidents of a *fee simple*.

But suppose tenant in tail, covenant to stand seized to the use of *himself for life, remainder to J. S. and his heirs*: The conveyance were void, and the *estate tail not altered*; for the remainder is not to take effect until *after his death*, when the title of the issue commences, which is *paramount* to the title of the remainder man, and the covenant to stand seized, as to the *estate for life*, is void; because there is no *transmutation* of possession; and therefore, if he afterwards levy a fine, or suffer a recovery to the use of a stranger, it shall enure to such use. Cro. Eliz. 895. 2 Salk. 619-620. Machell v. Clarke. Cf. 3 Rep. 84. b. 10 Rep. 96. a. Seymour's case. Took, v. Glascock, 1 Saund. 260.

And so *nota*, the diversity between conveyances *inter vivos*, and *testamentary dispositions*; and that the instance of the *jus accrescendi* between joint tenants is not singular in our jurisprudence.

The genius of the old feudal law, (and ours on this point is the *old feudal law*, modified by a very arbitrary construction of the courts, before the stat de donis, 13 Edw. 1.) is further discovered in what Glanville says, lx. vii. c. 1. on the subject of alienation. In his time every freeman possessed of land, might give a *part* of it with his daughter, or any other woman as a *marriage portion*—or to any person as a reward for services done him—or to a religious house or church; *if the gift were made in his life time*, and with the proper forms of livery and seisin, and in a reasonable proportion. But if any such donation was made on a *death bed*, it was not valid, without the consent of the heir. A man who had no estate by inheritance, but only a purchase, might dispose of *the whole* of that purchase to whom he pleased, by a gift *made in his life time*, if he had no child; but if he had one, he could only dispose of *a part*—nor could he bequeath it by will, although he had no child, because, says Glanville, God only can make an heir.

Now add to all this, the consideration, that a gift in *fee conditional* was, originally, what the words it was made in, necessarily import, a *strict entail*, and that the construction put upon these words by the judges before the stat. de donis, is confessed on all hands to have been an *asintia* of theirs, to make alienations as free as possible, contrary to the will of the donor and the genius of the feudal law, and we must, I think, come to the conclusion, that the courts can go no further, without assuming other powers than those of mere *judicature*.

I have heard it urged, that the tenant ought to be allowed to devise his estate, because otherwise, there might be a perpetuity. This would be a very important consideration, if this tendency to a perpetuity could, in fact, be counteracted by the expedient proposed. But unfortunately for the argument this is not the case. The right to devise, presupposes the very contingency, the remoteness and uncertainty of which alone may, in some cases, perpetuate the entail. The right to devise is contended for, because, say they, it is *one* mode of alienation: but tenant in fee conditional cannot avail himself of *any* mode of alienation until issue had, and this condition being once performed, the estate becomes a *fee simple absolute*, and the difficulty is at an end.

JONES, *ads.* POSTELL & POTTER.

The whole object of this motion is attained by the view which the court has taken of this ground, and the consideration of the numerous other questions made, have become unimportant and unnecessary.

The motion is granted.—*Richardson and Nott*, Justices, concurred.

Cart and Grimke, for the motion.

Desaussure and Petigru, *contra*.

However, this objection although misapplied in the case under consideration, is really a very important one in another point of view; that is a *perpetuity* where the possessor is not allowed to alienate the property—where an heir is forced upon him *per formam doni* and he cannot by any assignment or conveyance bar the entail—not where, if he do not choose, the heir will succeed *secundum formam doni* to the end of time. Thus since *Taltarum's* case, estates tail have ceased to be perpetuities, merely because it is now optional with each successive tenant in tail, whether the entail shall continue or not; and any settlement made, on however remote a contingency shall have effect; provided it be within the reach of a fine or recovery. Thus if an estate be limited to A. for life, remainder to trustees to preserve, &c. remainder to the first and other sons of A. in tail, remainder over with a proviso, that if B. die and there should be total failure of heirs, or heirs of the body of B. then the uses limited to A. and his sons should cease, and the lands remain to the use of C. and his heirs; this limitation to C. is valid, because when the first tenant in tail comes into possession, he may bar it by a common recovery, and therefore there is no danger of a perpetuity. *Doe v. Heneage*, 4 T. R. 13. *Sanders on Uses and Trusts*, 154.

To apply this doctrine to the case of a *fee conditional*: the right to bar such an entail may, it is true, and in most cases would exist; and so far alienation not being absolutely prohibited, or even very much restrained, there might seem to be no reason for considering the gift as creating a perpetuity. But then the contingency *might* not happen: the having issue is a condition which it does not entirely depend upon the will of the tenant to perform or not, and circumstances may prevent its being performed for generations together. If, therefore, we are to take the law in the rude state, we find it in when Bracton wrote, and for some time after, there would often occur cases of actual perpetuities. [Is not the danger of perpetuity practically guarded against, by the circumstances that the power of alienation must exist, during the life of every tenant, by the performance of the condition, or the estate revert for want of performance; and thus become unfettered? R.] What is to prevent the judges, then, adopting with regard to such limitations, the rule that has been applied to contingent remainders, executory devises and springing uses, and is now considered as a fundamental and universal principle of our jurisprudence, viz. That the right of barring such contingent gifts, shall in no case be extended beyond a life or lives in being, and twenty-one years and a few months after? Only, it might be proper to distinguish between those cases where the tenant in fee conditional *could* not bar, i. e. where there was no issue, from those where he *could* bar; viz. where there being issue, he did not choose to alienate the estate *inter vivos*. In the latter, the doctrine of fee-tail would apply, and therefore no *dignus vindice nodus*; but the former would demand the extraordinary remedy of the courts; the *theos apo mechans*.

RICHARD I. MORRISON, *ads* THOMAS BARKSDALE.

The act of 1778, requiring justices of the peace, before taking upon themselves to exercise the office, to sign a roll, to be lodged in the secretary of state's office, has become inoperative, and is virtually repealed:

And this, by long disuse; by subsequent laws, which, if not directly inconsistent with the provision, are evidently founded on the supposition that it does not exist; and by change of circumstances, which have rendered the provision inapplicable and unnecessary.

THIS was a *qui tam* action of debt, to recover against the defendant, a penalty of £1,000 currency, for having taken upon himself to exercise the office of magistrate, without being duly qualified. The act of 1778, *Pub. Laws* 301, after prescribing the manner in which magistrates are to be qualified, and the oath of office, provides, that "the said magistrates shall, at the time of qualification, sign a roll which shall be lodged in the secretary's office, that all persons may resort thereto for their information, and thereby discover who are acting magistrates," and imposes the penalty of £1,000 currency on any one who shall take upon himself to act as a magistrate, without first complying with the directions of the act. It appeared from the evidence that the defendant had taken upon himself to act as a magistrate, without having signed the roll, as required by the act. The presiding judge was of opinion, and so instructed the jury, that the act, in this particular, was in full force and operation, and that the defendant's neglect or omission to conform to it, had subjected him to the penalty; and they found a verdict against him for the amount. Misdirection on this point, was made one of the grounds of a motion for a new trial.

The opinion of the court was delivered by Mr. Justice Johnson.

It is not pretended that the act on which this action is founded, has been repealed in express terms, and there is no doubt that signing the roll to be kept in the secretary's office, was one of the requisites prescribed by the act as necessary, prior to entering on the duties of the office of magistrate. It is obvious then, that the liability of the defendant depends on the question, whether this clause of the act has or has not become inoperative. The following are amongst the received rules for the construction of statutes:

MORRISON, *adv.* BARKSDALE.

1st. If a subsequent statute contain provisions inconsistent with a former statute on the same subject, it operates as a repeal of the former, although it contain no negative words.

2nd. If absurd consequences, or those manifestly against common reason, arise *collaterally* out of a statute, it is void *pro tanto*.

3rd: If a statute be of dubious construction, long usage may be called in to aid the exposition.

Before we proceed to the application of these rules, it will be necessary to take a brief review of the several statutory provisions on this subject, and of the usages under them, as far as can now be ascertained. The constitution of 1778, provides, that all justices of the peace shall be nominated by both branches of the legislature, and commissioned by the governor, during pleasure. The act of 1778, on which this action is founded, followed immediately after, and is avowedly predicated on this provision of the constitution. By this act, all persons appointed to that office, are required to take the oath appointed by the 36th article of the constitution of 1778, and the oath of office which is prescribed; and to sign the roll. The next statutory provision on the subject, is to be found in the 7th section of the provisional articles of the constitution of 1790, by which it is ordained, that the legislature shall, at their next session, elect justices of the peace throughout the state; that all former commissions of the peace shall then cease, and that, thereafter, all commissions of the peace shall expire at fixed periods, to be declared by law. The act of February 1791 followed; by which it is provided that "all justices of the peace shall be appointed as heretofore, and shall continue in office four years;" 1st. *Faust* 50. By the act of 1799, 2nd. *Faust*, 259, the term of office is extended to thirty days after the session of the legislature, at or next after the expiration of the four years for which they were appointed; and the act 1800, 2nd. *Faust*, 360, authorises two justices, whereof one shall be of the Quorum, to administer to any person the oath or oaths of office, which is, are or may be required by law, to be taken by such person. I have not been able to ascertain, with any degree of certainty, what was the usage under the act of 1778, prior to the act of 1791. It is certain, however, that from 1791

MORRISON, *ads.* BARKSDALE.

down to the present day, commissions of the peace, as provided for in the constitution of 1778, have never been issued by the governors, and that signing the roll, kept in the secretary's office, has never been practised, except occasionally, by magistrates appointed for Charleston and its vicinity. In respect to the state generally, it was a dead letter, forgotten and buried, and is now brought to light, no doubt, for the purpose of gratifying the worst passions. With these facts before us, we will proceed to enquire how far the constitution and act of 1778, has been rendered inoperative by subsequent acts or statutory provisions. By this act, magistrates are required to take the oath appointed by the 36th article of the constitution of 1778. The 4th art. of the constitution of 1790, also provides an oath for all persons appointed to offices of profit or trust. By the constitution of 1778, they are to be commissioned by the governor during pleasure. By the act of 1791, the term of office is limited to four years; and from that time commissions have been disused. By the act of 1778, they are required to qualify before the governor, or before commissioners duly appointed by him. By the act of 1800, two justices, one of whom shall be of the quorum, are authorised to administer the oaths of office; so that according to the most rigid application of the first rule laid down, all that remains of the constitution and act of 1778, is that which prescribes the form of the oath of office, and that which requires those who are appointed to sign the roll. The constitution of 1790 evidently contemplated an entirely new modification of the government, without reference to, or dependance on the constitution of 1778. It professes to provide, of itself, for all matters proper for such an instrument, and the organization of the magistracy is expressly provided for; and it is worthy of consideration, whether this circumstance is not, *per se*, a virtual repeal of an act, growing out of a system created by it, and expressly referring to it, although it may not be in direct opposition, or wholly repugnant to its provisions. But supposing it to be a doubtful question; we have the usage under the constitution of 1790 and act of 1791, down to the present time, which has dispensed with the necessity of signing the roll; and according to the third rule laid down, they operate as a virtual repeal of the act of 1778. Again, it is in the recollection of

MORRISON, *ads.* BARKSDALE.

all that are conversant with the history of the times, that the act of 1800, authorizing magistrates to administer oaths of office, grew out of the inconvenience felt by those in remote parts of the state, in attending the person of the governor to qualify, and was intended to remedy this evil. But if the magistrates are now to be summoned from Pendleton or Horry, to enrol their names in the office of the Secretary of State in Charleston and Columbia, as to them, this act was of little purpose. They are moreover required to do this at the time of qualification; and if they may take the oath of office before magistrates, in Pendleton and Horry, literal compliance with the act of 1778, is impossible, and falls within the second rule.

There is another view of this subject, which reconciles my mind fully to the conclusion, that signing the roll is unnecessary, and that so much of the act as requires it, has become inoperative. The avowed object in requiring it, was, that it might be known who the magistrates were. They are appointed by resolution of the legislature, and their names all enrolled in their journals. Their appointments are printed with their acts, which are put into the hands of almost all the civil officers of state, and even into those of the secretary of state, and are indeed a matter of as much notoriety as if published from the house tops in every district of the state; and to say the least of the act, this provision has become useless and unnecessary. It is not intended to go the length of saying that the oath of office, required by the act, is also superseded. Its use has been consecrated by an usage even more inveterate than that by which the other was rejected, and is, in itself, so well adapted to the occasion, that it ought to be retained.

Motion granted.—*Bay, Nott, Colcock and Gantt, Justices, concurred*

J. B. Legare and J. W. Toomer, for motion.

Simons, contra.

JOHN GLENN, *Trustee*, vs. JACK LOPEZ.

Defendant, who was confined in jail, on a recovery in an action on the case, petitioned for the benefit of the Insolvent Debtors' Act. Held that no other evidence than the record itself could be received, to shew the nature of the trespass, for which the recovery was had.

The provision of the Prison bounds act, excluding from its benefits persons "seen without the walls," or "without the rules," extends to applicants for the benefit of the Insolvent Debtors' Act.

Mere being seen without the walls, does not exclude from the benefits of the act. The test is, whether defendant's being without the rules, was voluntary; or the result of causes which he could not control.

A free person of color receiving the benefit of the act, must take the oath prescribed by it.

THE plaintiff brought an action on the case against the defendant, for harboring a slave, and recovered a verdict for \$ damages. He was then surrendered by his bail, and he gave security to keep the prison bounds. In this state of things, he presented his petition, accompanied by a schedule of his property, duly sworn to, praying the benefit of the act for the relief of insolvent debtors. On the hearing of the application, the plaintiff, for the purpose of excluding him from the benefit of the act, offered to prove, by evidence, that the injury on which the action was founded, was committed under circumstances of great aggravation. He also offered to prove, that the defendant had, after he had given the security, been seen without the prison rules; all of which the presiding judge refused to admit.

In the course of the examination, circumstances appeared which raised a presumption that the defendant had not included in his schedule, sundry articles of property, to which he was entitled, and under the circumstances of the case, he was permitted to amend his schedule by inserting them. The defendant being a free person of color, (a negro) and the presiding judge being of opinion that he was not competent to take an oath, ordered his discharge without administering the oath required by the act. The appeal which was made from this decision on the part of the plaintiff, involved the following questions:

GLENN, vs. LOPEZ.

1st. Whether the plaintiff could resort to other evidence than the record itself, to shew the nature of the injury on which the action was founded:

2d. Whether the act of going without the prison rules, did not, *per se* exclude the defendant from the benefit of the insolvent debtor's act:

3d. Whether the court was justifiable in permitting the defendant to amend his schedule, after it was sworn to and filed:

4th. Whether the defendant ought to have been discharged without taking the oath prescribed by the act, although a free person of color.

The opinion of the Court was delivered by Mr. Justice Johnson.

Amongst the cases enumerated in the 7th sec. of the insolvents debtor's act, *pub. laws*, 251, is that of the defendant's being in custody on a recovery for a wilful and malicious trespass, or to use the words of the act, "no person or persons shall be entitled to the benefit of this act, who shall be sued, impleaded or arrested for damages recovered in any action for wilful maihem or wilful and, malicious trespass," &c. and the evidence offered was intended to prove that the injury for which this action was brought fell with the class, and its admissibility gives rise to the first ground of the motion. By way of testing its admissibility, let the question be asked, for what cause is the defendant in custody? The answer must be, that it is the consequence of the recovery against him; and this recovery is founded on the case stated in the record. Independently of this deduction, there are other considerations which clearly exclude any other evidence. There would be no possibility of attaining any thing like certainty, except by trying the whole case *de novo*, and even then, it must remain uncertain whether the damages found were predicated on the precise state of the facts developed in this new investigation. If the record is once departed from, there is no limitation, as the plaintiff would be at liberty to go into proof of any other injury, however foreign to the action in which the damages were found. The evidence tendered on this point was, therefore, clearly inadmissible.

Regarding this as an action on the case, and confining the

GLENN, vs. LOPEZ.

plaintiff to the record for the evidence of its character, it has not been insisted that the defendant is excluded from the benefit of the act; and such an idea is clearly excluded by the opinion of the court in the case of *Walling vs. Jennings*, 1st. *M^c Cord* 10, which belonged to the same class, that the defendant was entitled to the benefit of the act.

2d. *The insolvent debtors' act* contains no provision for the admission of persons confined on civil process to the prison rules; but it is provided for in the 7th clause of the act usually called the *prison's bounds act*, *Pub. Laws*, 457; by which it is enacted, that no person "shall be discharged without fully satisfying the action or execution in which he or she is confined, if since his or her confinement, and before he or she gave security as aforesaid, he or she has been seen without the prison walls, or if since his or her giving such security, he or she has been seen without the prison rules, without being legally authorised to do so." On the part of the defendant, it was contended that this clause of the act was not intended to apply to persons claiming the benefit of the insolvent debtors act, but exclusively to those applying for the benefit of the prison bounds act. In the case of *Peck vs. Glover*, 1st *Nott and M^c Cord*, 582, it is remarked, perhaps more generally than was justifiable, and certainly more so than was necessary to the case, that this clause applied exclusively to cases under the insolvent debtors' act. That case turned upon the question whether a bond given by a person confined on *mesne process* could, if broken, be assigned to the plaintiff, and the first member of the section under consideration only provides for the assignment of a bond given by one confined *in execution*; so that its applicability was not necessarily involved; and upon looking into both the acts, it will be clearly seen, that as applied to this question it must be retained as indispensably necessary to both; for without it, many of their most important provisions would be wholly defeated. To return to the question made in the second proposition: If a literal construction was to be adopted, it would seem that the fact of being without the prison walls or bounds would, per se, exclude the defendant from the benefit of the act; but its operation would be so unreasonable that it would lose its influence as a law. According

GLENN, *vs.* LOPEZ.

to this construction, if the prison should be on fire, the debtor must either elect to perish in the flames or suffer perpetual imprisonment; or if he should be carried beyond the rules by force or accident, over which he had no control, he must pine out his existence in the four walls of the jail: and on the other hand, it would be destructive of the objects of the act, if he was permitted to go without and return at his pleasure. As the best means of guarding against these extremes, it appears to me that a defendant's right to the benefit of the act ought to be tested by the issue, whether his being without the rules was voluntary, or the result of causes which he could not control. If the former, sound policy would exclude him from it; if the latter, justice and humanity strengthens his claim to them. The evidence on this point having been excluded, the court are unable to make the application; we think, however, that it ought to have been admitted, and that its influence ought to have been determined on the foregoing principles.

3d. The third question is founded on the 15th clause of the insolvent debtors' act, which excludes a debtor from its benefits who "shall conceal any part of his estate, and not make a full surrender and delivery thereof," &c. It was contended that this provision would be wholly defeated, if on being detected in an attempt to conceal or keep back a part of his estate, the defendant should be at liberty to shelter himself under the privileges of an amendment, and thereby escape the penalties imposed. To this it is with great propriety replied, that a construction which would incarcerate for ever an unfortunate debtor, who, intending to deliver up his all to his creditors, had, from one of those casualties or inadvertencies to which the whole human family are exposed, omitted in his schedule some unimportant article of property, would be too narrow and illiberal for practical purposes. Such undoubtedly would be the consequences of this mode of construction, and hence the necessity of the practice which has been sanctioned by repeated adjudications, of permitting amendments even after the schedule was filed. It ought not, however, to be indiscriminately admitted, as in its consequences the result apprehended might be realized; and it appears to me that the only safe footing on which it can be put, is to throw on the applicant

HAPPOLDT, vs. JONES.

the burden of showing satisfactorily that the omission was not designed to effect a fraudulent concealment, or to give some other reasonable account why the property was not included.

4th. The only remaining question is as to the legality of discharging the defendant without oath. This was not claimed as a privilege by the defendant, but originated with the court. It was supposed that the same policy which excludes persons of color from giving evidence, would operate so as to exclude them from taking an oath in any case. As a mere matter of policy, it was always within the control of the legislature, and taking the oath prescribed by the act is made a condition, *sine qua non*, to entitle him to its benefits. There is no exception, and to carve out one for this case, would be to destroy one of the securities provided for in the act, as a guard against fraudulent concealments. The court are of opinion, therefore, that the defendant ought not to have been discharged without taking the oath.

Huger, Nott, Justices, concurred.

Grimke, for the motion.

Furman, contra.

ADMINISTRATORS OF HAPPOLDT, vs. ELIAS JONES.

In an action by the administrator of an insolvent estate, defendant is not entitled to avail himself, by way of discount, of a negotiable note, made by the intestate and transferred to defendant after his death, to the full amount due on the note: but only to a reduction, rateably with other creditors.

ASSUMPSIT, on an account due by the defendant to the plaintiff's intestate. Amongst other grounds of defence, the defendant offered, by way of discount, a due bill for \$150, made by the intestate, payable to John Egleston or bearer, which had been transferred to the defendant after the death of the intestate. It was admitted that the estate was insolvent and would not pay more than five shillings in the pound; and the question was, whether the defendant was entitled to the whole amount of this discount, or only in average proportion with creditors of the same class. The presiding judge instructed the jury that the defendant was entitled to the full amount of the discount, and they found accordingly; and a new trial was moved for on the ground of misdirection in the foregoing particulars.

HAPPOLDT, vs. JONES.

The opinion of the Court was delivered by Mr. Justice Johnson.

At the death of the intestate, Eggleston, to whom the due bill was payable and who then held it, stood in the relation of a creditor of the estate to that amount; and the act of assembly, *Pub. Laws*, 494, which prescribes the mode of marshalling assets and paying debts, expressly provides that no preference shall be given to creditors in equal degree. The debt due by the defendant was assets; and it is acknowledged that there were not enough to pay the debts. The effect of allowing the whole amount of the discount, is the payment of that entire demand, in exclusion of others, and is in direct opposition to the provisions of the act. The circumstance that the due bill was transferred to the defendant, cannot alter the rights of the parties.

In the character of creditor, Eggleston could only transfer the rights which he had as such, at the time of the intestate's death; which according to the act, was only to a rateable proportion, in common with other creditors of equal degree; and the defendant could take no more. A contrary rule would furnish the greater facilities for obtaining an undue preference, to an extent that would wholly defeat the wise and equitable provisions of the act. The debtor of an insolvent estate would find little difficulty in purchasing up demands against the estate, sufficient to cover the amount due by him, and thus appropriate so much to himself in exclusion of others. As a matter of expediency, therefore, the court would not be inclined to adopt it. The case of *Mayhew vs. Flake*, 2nd. Nott & M'Cord, 398, which is relied on in opposition to the motion, is clearly reconcilable with this view. There the discount consisted of a debt due by the intestate to the defendant, at the time of his death, and which operated as an extinguishment, pro tanto, of the debt due by him; so that in respect to this, he did not stand in the relation of creditor. The discount in that case was, therefore, properly admitted.

The motion for a new trial, is granted. *Colcock, Gantt, Richardson & Huger*, Justices, concurred.

Desaussure, for the motion,

Dunkin, contra.

THOMAS W. PRICE, *ads.* JOHN JUSTROBE.

The granting of a continuance, is a matter for the discretion of the judge before whom the cause is brought.

A note, promising to deliver "so many barrels of rice as will amount to two hundred dollars, at one dollar per cwt." another, for the delivery of twenty-five barrels of rice, at one dollar and twenty-five cents, per cwt. Held that the measure of damages, in an action brought, was the actual value of the rice, on the day appointed for the delivery.

The possession of orders drawn by the defendant, for goods, were not sufficient evidence of the delivery of the goods; the plaintiff being a merchant and presumed to keep regular books.

THIS was an action of assumpsit on the following notes, *viz.* "Charleston, 8th November, 1814. Sixty days after date, I promise to deliver Mr. Justrobe, or order, such number of barrels of new rice as will amount to the sum of two hundred dollars, value received this day, at one dollar, per. cwt. (Signed,) T. W. Price." "Sixty days after date, I promise to deliver Mr. Justrobe twenty-five barrels of rice, at one dollar and one quarter per cwt. 28th December, 1814. (Signed) T. W. Price." To these was superadded an account for goods sold and delivered, amounting to \$99 87-100. The only evidence offered to prove the account were orders, drawn by the defendant, requesting the plaintiff to deliver goods to third persons, but there were neither book entries or any other proof of the delivery of the goods, than the mere possession of the orders. The jury, under the direction of the court, found a verdict for the plaintiff, estimating the rice at its value at the time it was to be delivered, which exceeded considerably the value fixed by the notes, and also for the amount of the account. Before the case went to the jury in the circuit court, the defendant moved to continue it, on the ground of the absence of a witness who had been summoned, and whose materiality was sworn to by the defendant; but the court rejected the motion, and ordered the case on for trial. The defendant moved for a new trial on the following grounds:

1st. Because the defendant was unprepared for trial, and under the circumstances, the cause ought to have been continued, and compulsory process issued against the witness:

PRICE, *ads.* JUSTROBE.

2d. Because the jury erred in estimating the value of the rice at a higher rate than that expressed on the face of the notes.

3d. Because plaintiff was not entitled to recover the amount of the account, as no book of original entries or other legal proof was offered of the delivery of the goods.

The opinion of the Court was delivered by Mr. Justice Johnson.

From the nature of the thing, applications for continuances must alway be addressed to the discretion of the court, and any fixed rule on the subject is impracticable. It may be possible, and the rule of court is an effort to establish something like a principle, on which to exercise it; but in its application to the infinity of perplexing questions to which it gives rise, the presiding judge must be left free to act in such a manner as to secure a speedy and fair trial, the great object and end of the rule itself; and this court, for the most obvious reasons, ought not to interfere. It would involve the absurdity of controlling a discretion by discretion, without the aid of the circumstances on which it was first exercised. The defendant can, therefore, take nothing on this ground of the motion.

2d. It is impossible, by the most subtle construction, to give to the notes on which this action is partially founded any other legal effect than that of contracts for the delivery of rice, mentioned in them, on the days stated; the price mentioned, being nothing more than the consideration on which they were founded; and there is no principle better established or more universally acted upon, than that the measure of the damages is the value of the thing, on the day on which it should be delivered: to which there is no legal objection to superadd by way of damages, also, the interest which has since accrued on the amount. The jury did right, therefore, in adopting it in their estimate of the damages in this case.

3d. The last ground is not without difficulties; but after considering the subject well, my mind has come to the conclusion that the account was not legally proved. The orders were mere authorities to deliver the goods to the person in whose favor they were drawn, and do not contain any intrinsic evidence that they were delivered; and when it is recollected that the plaintiff was a merchant, and kept, or ought to have kept

CARSTEN, vs. MURRAY.

regular books, in which the goods delivered ought to have been entered, and that he himself, or any clerk, was competent to prove them; keeping them back, or not accounting for them, creates a strong suspicion that all was not fair. The presence of the book was necessary for another purpose; it might have appeared that the account had been settled, or that the goods had only been partially delivered; and under the usage of this country, where slaves are the usual agents when goods are wanted for family use, it would be impossible for the defendant to disprove the delivery. I think, therefore, it was incumbent on the plaintiff to prove the delivery of the goods by other means than the mere production of the orders, and a new trial is ordered, unless the plaintiff enter a remittitur for the sum of \$99 87-100, the amount of the account.

Bay, Nott, Gantt, and Huger, Justices, concurred.

White, for the motion.

Dunham, contra.

JOHN CARSTEN, vs. ROGER MURRAY.

An Action on the case cannot be maintained for an injury done by beating the plaintiff's slave. Trespass, vi et armis, is the only proper remedy.

THE plaintiff declared in trespass on the case, against the defendant, for beating his (Plff's) slave. Defendant demurred generally, and plaintiff joined issue in demurrer. The ground argued in support of the demurrer was, that the action of trespass on the case would not lie for such an injury, and that the only remedy was trespass, vi et armis; and the honorable, the recorder of the city court, before whom the cause was tried, being of this opinion, gave judgment for the defendant. The plaintiff moved this court to reverse that judgment, on the ground, that either *trespass on the case*, or *trespass vi et armis*, would lie for such an injury, and that he had a right to elect which action he would bring.

The opinion of the Court was delivered by Mr. Justice Johnson.

CARSTEN, vs. MURRAY.

The general position, that an action of trespass vi et armis, will lie for injuries committed with force, is not controverted by the grounds of this motion; nor was it insisted on in the argument. There can be no doubt that it would have lain in the present case; it therefore only remains to be enquired whether the proposition that an action on the case would also lie, can be supported on principle or authority. There may be cases in which the line of separation between these two remedies is so finely drawn as to require the nicest inspection to trace it; but in most cases, the distinction is so marked as to admit of little doubt in its application. So far back as the case of *Scott, vs. Shephard*, 3 *Wilson*, 411, the distinction appears to have been well understood to depend on the fact, whether the injury complained of, was the immediate consequence of the act, or whether it was remote or consequential; if the former, then trespass vi et armis, was the proper remedy; if the latter, case; and *C. J. De-Grey*, in delivering his opinion in that case, illustrating this distinction, remarks that trespass lies against any person from whom an injury is received by force. So that the question is whether the injury was received or resulted directly from the force of another, and this distinction is kept up and recognized in all the subsequent cases; *Day vs. Edwards*, 5 *Durnford & East*, 649; *Ogle vs. Barnes*, 8, *Durnford & East*, 190. In *Day vs. Edwards*, the case of throwing a log into the highway, is put, by way distinguishing between the presence or absence of force. If I am hurt by the act of throwing, this constitutes force and the injury is immediate; but if it lies there and I stumble over it, there is an absence of force, and the injury is consequential. The injury of which the plaintiff in this case complains, is that the defendant beat his slave; there was then the immediate application of force, and the injury proceeded immediately from the defendant, and according to the rule laid down, the remedy was trespass vi et armis. An argument in support of the motion has been drawn from a supposed analogy in the relation of master and servant in England, where the remedy for an injury done through the person of the servant is case, and that of master and slave in this country; but it will not hold good. In England the master has no immediate and direct interest in the person of the servant, and consequently

CARSTEN, vs. MURRAY.

can only be mediately or consequentially affected, by an injury done to him; but in this country, the master's property in the slave, is as absolute as in any other article of property. Force committed on a slave, is, therefore an immediate injury to the master. The case of *White vs. Chambers*, 2 Bay, 70, I observe, was a special action on the case; but there the great contest was, whether *any* action would lie for such an injury; and the question, whether *that* was the proper remedy was not decided, nor did the court throw out any intimation of an opinion upon the point. It is sometimes difficult, if not impossible, to discover clearly the philosophy or the necessity of the rules by which the different remedies are made to apply to the various wrongs which one man may inflict on another, but the propriety of preserving them, when they are distinctly marked, will be universally admitted. They partake not of form only; for, as remarked by Mr. *I. Grose*, in the case of *Savignac vs. Roome*, 6th Durnford & East, 130, in reference to these two actions, "they differ substantially, in the pleading, the evidence, the judgment and some of the consequences which follow therefrom," and indeed the difference in the amount necessary to carry costs, would of itself be a sufficient reason for preserving the distinction.

The motion is dismissed.—*Nott, Colcock, Gantt, Richardson, Huger*, Justices, concurred.

Toomer, for motion,
 ————— contra,

SIMON MAGWOOD, *ads.* ANN LEGGE, *Administratrix of Sophia Packrow.*

H. H. executor of S. P. deceased, but who was not shewn to have ever proved the wills or qualified, sold a slave belonging to his testatrix's estate, to defendant, "his executors, administrators, and assigns forever;" but did not style himself executor in the bill of sale. By the will of testatrix, the "annual income" of the property was given to the executor, H. H. in remainder, expectant on the death of a third person person without issue. Held that H. H. had full power to sell, as executor, though he had never proved the will, nor qualified; and having no power to sell as legatee, he should be taken to have sold as executor, though he did not so style himself in the bill of sale. He who does an act which he cannot do effectually, but by virtue of an authority, shall be taken to have acted in execution of his authority.

TREVER to recover the value of a slave, named Cuffy. It was admitted on all sides that Cuffy, originally belonged to Sophia Packrow, and the plaintiff claimed as her administratrix, with the will annexed. The claim of the defendant arose out of the following circumstances:

In 1796, Sophia Packrow made her will, and died sometime after. The will contains the following clause, "I give, devise and bequeath to my beloved grand-son, Paul Harvey Dudley, the whole of my estate, both real and personal, to him and his lawful issue forever. But in case my grand-son aforesaid, should die, leaving no issue lawfully begotten, then in that case, my will and desire is that my personal property be kept together, and that my beloved son, Henry Harvey, shall inherit the annual income of such property, and all and every species of other property, without disposing of any part thereof. But in case my grand-son, aforesaid, should die, leaving no issue lawfully begotten, and my son, Henry Harvey, should die, leaving lawful issue, then my will and desire is, that such issue shall inherit such estate both real and personal," &c. and in the event of the failure of such issue, the will contains a further limitation over to others, and William Warren and her son Henry Harvey are appointed executors. At the death of Sophia Packrow, Paul Harvey Dudley was an infant, and her estate went into the hands of Henry Harvey, her executor; and by a bill of sale, dated in 1798, he conveyed the negro in dispute, which was a part of that estate, to the

MAGWOOD, *ads.* LEGGE.

present defendant. The bill of sale purports to be executed by Henry Harvey, in his personal and not in his representative character, as executor, nor does it appear that he ever qualified as such. Henry Harvey died some time after, and letters of administration with the will annexed, were granted to the plaintiff. About seven or eight years ago, Paul Harvey Dudley died without issue.

The contest in the court below seemed to have turned on the proof of the identity of the slave, his value, and the interest which Henry Harvey took in him, as a legatee, under the limitations of the will. The jury, under the direction of the presiding judge, on the questions of law arising out of the facts, favorable to the plaintiff's right to recover, found a verdict accordingly, and the defendant moved for a new trial, on the following grounds:

1st. Because there was no proof that the slave in question ever belonged to the plaintiff's testatrix.

2d. Because the plaintiff was not entitled to maintain the action.

3d. That the defendant's title was clearly proved, and under the circumstances of the case, he was entitled to a verdict.

4th. That his honor misdirected the jury, in charging, that by law the plaintiff was entitled to recover, unless they were of opinion that the slave never had belonged to the estate of Packrow.

Grimke, for appellant. The executor had an undoubted right to sell and to make a perfect title. Whether he ever qualified is immaterial; if he does any act as executor, it fixes the character upon him and he cannot renounce it. He is competent to do any act, before probate, which he may do after it. He may sell without leave of the ordinary; he may sue, and that in his own name and on his own possession, without styling himself executor. It illustrates the power of the executor over the estate, that his assent vests a perfect title to a legacy; so that not even a creditor can touch it. Yet a legatee is a mere volunteer. A purchaser for valuable consideration is more favored by the law; and as against a volunteer, his title should be protected. *Harth, vs. Heddleston*, 2 Bay, 321; *Lovelass on*

MAGWOOD, *ads.* LEGGE.

Wills, 191; 1 *Term. Rep.* 480; 1 *Salk*, 302; *Cro. Jac.* 113, *Cro. Elix.* 568.

When there are several executors, one alone may sell and bind the rest. 1 *Atk.* 460; *Cro. Eliz.* 496.

Another principle is, that if a man do an act which he cannot do effectually but by an authority, it shall be taken to be in execution of his authority. *Parker, vs. Kett*, 2 *Salk.* 96: And Henry Harvey had no right nor power, with respect to this property, but from his character of executor. The present administratrix *de bonis non* represents the former executor. In the view of the law, they are the same person; and if the plaintiff should succeed in the present action, it will occasion the singular result of a vendor avoiding his own sale, on the ground of his want of authority to sell.

Hunt, contra. The ground which is now principally relied on, was not taken in the court below; and we fairly considered this as equivalent to a concession, that Henry Harvey had no title in his character of executor; that is, that his title had been divested, by a previous assent to the legacy to Paul Harvey Dudley. We may presume too, from the verdict of the jury, that they have found such assent. It is said that if a man can only do an act by virtue of an authority, his act shall be referred to that authority; but it is equally true, that a man shall not be presumed to have committed an act of fraud; he shall be presumed to have done what he was under a moral and official obligation to perform. The executor was under such an obligation to assent to the legacy, and it was a fraud if he sold as executor. Henry Harvey certainly had an interest, as legatee, under the will; and the court may justly conclude that he sold with reference to that interest.

Since the act of the legislature on the subject, it may be doubted whether an executor has the power to sell without the ordinary's permission. In the case of Harth and Heddleston, permission had been obtained, but the executor did not sell in pursuance of it. Much inconvenience and the ruin of estates will result, if insolvent executors be authorized to sell without restraint.

Grimke, in reply. If there was an assent to the legacy, the present plaintiff cannot maintain the action: not the repre-

MAGWOOD, *ads.* LEGGE.

representative of Sophia Packrow, but the remainder man of the estate must sue. An executor cannot qualify his assent; if he assented to the particular legacy, he assented to all that depended on it; and the estate passed, never to return to him in his representative character.

The opinion of the Court was delivered by Mr. Justice Johnson.

The brief, on which this case has been argued, contains a variety of grounds, which from the view taken by the court, have become unimportant. It will, therefore, only be necessary to consider those on which the case turns, and which arise out of the third ground of the brief. There is no doubt about the fact, that Henry Harvey, the executor, did sell the negro in dispute to the defendant in 1798, and if he had the power to do so, there is as little doubt that the verdict is wrong. It is, therefore, proposed to consider:

1st. Whether he had or had not that power.

It is not in proof whether either the other executor or himself did prove the will and qualify: and notwithstanding the great length of time which has elapsed since the death of the testator and the sale of the negro, would, in the absence of proof, furnish a strong presumption in support of the affirmative, yet for the purposes of this case, it may be conceded that he did not. An executor, unlike an administrator, derives all his interest in, and power over an estate from the will of the testator, and not from the letters testamentary granted by the ordinary. 2 *Bacon's Ab. Tit. Executors and Administrators, E. 14*; and having once elected to accept the administration, he can never afterwards divest himself of that character. Any act which would constitute him executor de son tort, as taking possession of the goods and converting them to his own use, or disposing of them to another, or releasing debts due to the testator, and the like, is evidence of such acceptance. 2 *Bacon's Ab. Title Executors and Administrators, E. 10*. It follows, therefore, that the fact of selling the negro in dispute to the defendant was an assumption of the powers of an executor and invested him with that character. But it is expressly laid down, that an executor may, before probate, possess himself of the goods of the testator. He may pay debts and legacies and give releases for debts due

MAGWOOD, *ads.* LEGGE.

to the testator. He may, in his own name, maintain trespass, trover, or detinue, for goods which he has had in possession, and, as more strictly applicable to this question, he may sell, give away, or dispose of the property of his testator as he pleases. Indeed with respect to his power over chattles which he has reduced to possession, I have been unable to find any limitation. 2 *Bacon's Ab. Title Executors and Administrators*, E. 14. As executor he might, therefore, lawfully sell the negro to the defendant, even before the will was proved. It is true, the bill of sale to the defendant is in the name of Henry Harvey, without the addition of his character as executor, and this circumstance has given rise to the question:

2. Whether this addition was necessary to transfer the right.

It is certainly a matter of convenience, which ought never to be lost sight of in conveyancing, to recite the authorities and exhibit the true characters in which the parties act; as they serve as indices to circumstances which it would be difficult to trace without them, at a distant period; but it is not indispensably necessary. The general rule is, that when one does an act which he cannot do so as to be effectual, otherwise, than by virtue of an authority, it shall be taken to be in exercise of that authority, although it be done in his own name; *Parker, vs. Kett*, 1 *Salk*, 95; and the good sense and sound policy of the rule, is clearly deducible from the consequences which would result from a different rule in the present case. Henry Harvey was in possession of the negro, which of itself was prima facie evidence of property and consequently of the right to dispose of it, and had, as has been before observed, the legal right to do so; and it does not appear that the defendant was informed of the character in which he possessed these powers. If therefore the concealment of his authority was sufficient to avoid the sale, the most detestable frauds might be practised, and it would lead directly to the ridiculous result, that one might dispose of property in his own name and recover it back in a representative character. There is one qualification of this rule, which has been thought applicable to the present case and which deserves consideration. It is, that where one has an interest and authority both, and does an act without reciting the authority, it shall be taken as done by virtue of his interest. 1st. *Salk*, 95. The application of

MAGWOOD, *ads.* LEGGE.

this principle is supposed to be derived from the circumstance, that Henry Harvey had an interest in this property, expectant on the death of Paul Harvey Dudley, without issue; from whence it is concluded that the sale to the defendant should be taken in reference to that authority. It does not appear to me, that by the terms of the will, he, as legatee, even admitting the contingency to have occurred upon which his interest depended, had any power over, or interest in the property itself. The devise, to use the words of the will, is of the "annual income," and there is moreover an express prohibition to his disposing of any part of the property. There is another view which to my mind is equally conclusive. The bill of sale professes to convey to the defendant an absolute and unconditional property in the negro. The *habendum* is to him, "his executors, administrators and assigns, and to their own proper use and behoof forever." Give, therefore, to Henry Harvey, all the interest which he could, by the utmost liberality of construction, take as legatee under the will, and it falls far short of that he has transferred to the defendant. The act done by him, was one which he could not do, so as to be effectual, otherwise than by virtue of his authority as executor, and according to the general rule, it must be referred to that authority.

On these grounds, the court concur in the opinion, that a new trial ought to be granted.

Bay, Nott, Colcock & Gantt, Justices, concurred.

Grimké, for the motion,

Hunt, contra.

NOTE: It has been objected, with some degree of earnestness, that the questions on which the opinion of the court has been expressed, ought not to have entered into the case here, because they were not made in the court below, and perhaps it is due to the occasion, to express the view of the court on the subject. By the practice and rules of the court, we are precluded from entering into the case *de novo*, and it is true that this court will only hear the case that has been made on the circuit. But I apprehend that there has been a misapplication of them to the present case. The facts were clearly proved, and the questions arising out of them, are regarded as decisive of the rights of the parties, and the objection rests solely on the circumstance that they were over-looked in the circuit court. In a trial on the circuit, it is expected that the counsel will bring to the view of the court, all the points which are calculated to incline the scale on either side: but without intending to detract from the well deserved character of the bar for promptness and vigilance, I hazard little in saying, that few have had the conduct and management of a complicated and perplexing case, who have not on some

MARSHALL, *ads.* WHITE.

fully reviewing the events of a trial on circuit, discovered that some little matter has escaped his attention which might possibly have had its influence; and to permit an inadvertence of this sort to fix and control the rights of the parties, would work the most flagrant injustice. The rights of a party, so situated, stand, I think, even on higher ground. The court is the counsel of both the parties, and by it, the rules of law are to be applied to the case, arising out of the evidence; to restrain their perversion or misapplication on the one hand, and to supply a deficiency on the other; and to deny to this court the power of correcting inadvertences or mistakes, would be to pervert its office, from substantially administering the justice of the country, and make it merely the umpire of a contest of dexterity and promptness between the counsel.

MARY MARSHALL, *ads.* JOHN BLAKE WHITE.

The right to the use of a pew, the possession of the church being in the corporation, is an incorporeal hereditament; for disturbance in the enjoyment of which, an action of trespass vi et armis will not lie: but,

The declaration being in other respects complete and perfect, as a declaration in case, the words "with force and arms" will, after verdict, be rejected as surplusage.

THIS was an action of trespass, *vi et armis*, for disturbing the plaintiff in the use of a pew in St. Philip's Church, in the City of Charleston, and evicting and turning him out of the same. The declaration was in every respect in conformity with the most approved precedents of declarations in an action on the case for such an injury, except that it charged the act to have been done with *force and arms*. The only ground relied on, was in arrest of judgment, and involved the question whether the action of trespass, *vi et armis*, was the proper action to try the right to the use of a pew.

Gadsden, for the motion. The possession of a church, in England, is in the parson; and upon the same principle it is, in this country, in the possession of the corporation. By the old *Church act* of 1706, the church and church lands were vested in the rector; by the act incorporating the churches they were vested in the corporation. 3 *Brev. Dig.* 148. It follows that the right to the use of a pew is an incorporeal hereditament, of which there can be no actual possession. But possession is indispensably necessary, to maintain trespass *vi et armis*. For an injury of the sort complained of, case is the only

MARSHALL, *ad*:. WHITE.

remedy. 1 *Chit. Plead.* 143, 175, 178. 1 *T. R.* 430. 2d *Chitty*, 362, (*precedent.*) 8 *Wentworth*, 55. 3 *T. R.* 659. 5 *T. R.* 196. 1 *Wils.* 233. 1 *Lev.* 71; 2d. 193; 3d. 73. 1 *Sid.* 203. 3 *Cranch*, 45, 292. 3 *Woodeson*, 194-6. 2 *Blac. Com.* 428-9. 12 *Rep.* 105.

The plaintiff claims under a grant from the corporation; and it may be contended that it conveys a fee simple. It is to be presumed that the corporation understood the nature of the property they had in the church. *Grant* is the only means of transferring a property which is incapable of manual delivery; and such are incorporeal hereditaments. The grant was intended to convey no more. 2 *Blac. Com.* 317.

Hunt, contra. On motion in arrest of judgment, the Court will only look to the facts stated in the record. The declaration states, that the defendant, with force and arms, entered the pew and expelled the plaintiff. He must, therefore, have been in possession. It is a common case of trespass *vi et armis*, and does not come within the principle contended for.

The opinion of the court was delivered by Mr. Justice Johnson.

In the solution of the only question propounded in this case, it will be necessary to enquire, in the first place, into the character and nature of the interest which the plaintiff had in the pew. By the act of incorporation of 1785, (3 *Brevard*, 148.) the church and all its appendages are vested in the vestry and wardens; and the plaintiff derives his title to the use of the pew from a grant to his ancestor from the corporation.

Without entering into a minute analysis of this grant, it will be sufficient to remark, that it is evident from its tenor and nature, that the *use* was all that was intended to be conveyed, and the plaintiff claims no more. His interest, therefore, falls clearly within the class which are denominated incorporeal hereditaments. These are defined to be "a right issuing out of a thing corporate, or concerning, or annexed to, or exercisable with the same." Their existence is merely in idea and abstract contemplation (*Jacob's Law Dictionary*, title *Hereditaments*.) The absence of a substantial, tangible existence, is amongst the peculiarities of this estate. They elude our corporeal senses, and like the cardinal virtues, they exist, but are

MARSHALL. *ads.* WHITE.

not to be seen or handled. The authorities quoted in argument are perfectly satisfactory on this subject.

Having thus ascertained the nature and properties of the interest which the plaintiff has in the subject of the action, I will now proceed to enquire whether the action of trespass *vi et armis*, is applicable to the injury complained of. The action of trespass *vi et armis*, *ex vi termini*, can only lie where force has been used in the act from which the injury resulted, and it follows as a necessary consequence, that the plaintiff must be in possession, either actually or constructively, to be immediately affected by the force used to the thing acted upon; for it must be immediately connected with him, or the force employed does not reach him: *Leame, vs. Bray*, 3 *East*. 593; *Reynolds, vs. Clarke*, 2 *La. Raymond*, 1399; *Green, vs. Goddard*, 2 *Sal.*, 641. If we test the aptitude of this remedy to the injury complained of, it will clearly follow that it has been misconceived. The thing, acted upon (the plaintiff's right to the use of the pew) had no actual substantial existence; it was incapable of manual possession; and physical force could not be applied to it: the injury wanted, therefore, both the ingredients, possession in the plaintiff, and force by the defendant, necessary to sustain the action of trespass *vi et armis*. It is equally clear, I think, that the plaintiff's remedy was by an action on the case. This remedy is expressly provided for the numerous class of cases which do not fall within the preceding rule, and lies in all cases where the injury results not from force immediately applied, but where it is consequential; and within this class, are expressly included injuries to incorporeal rights; 3 *Blac. Com.* 122-3: *Sticks, vs. Booth*, 1 *Term Rep.* 428.

It has been stated, that the declaration in this case, in every respect, except the use of the words, "with force and arms," is in case; and it becomes a question of some consequence how far they ought to be allowed to affect it after verdict. I am unable to discover that the defendant was deprived of any advantage by the use of these words in the declaration; the case was fully stated and the same proof was required of the plaintiff as if they had been omitted; the defendant's plea and defence were the same; and the most that can be said of them is, that they were idle surplusage, inapplicable and unmeaning, as applied

C. & J. T. WEYMAN, *vs.* JOHN MURDOCK.

to the case stated on the record. It was a subject to which, as has been shewn, force could not be applied; and it is within the rules of practice to reject as surplusage, useless and irrelevant matter. It may be said that these terms possess technical and intrinsic meaning, as distinguishing between the different forms of action, and cannot be regarded as unmeaning. I admit that, connected with their subject matter, they are of great importance, but it would be a folly to apply them to subjects to which they have no relation, as when they are applied to the publication of slander and other things of the same nature, and equally so when applied to the case under consideration. It is not denied that the defendant has a right, in respect to form as well as substance, to have a declaration free from exception, before he can be compelled to answer or plead to the merits; but he may, if he thinks proper, waive this privilege; and does so, in many cases, by pleading to the merits. The only mode of taking advantage of these omissions is by special demurrer, or on a motion for a non-suit, as circumstances may justify. Here the objection is rather to the form than the substance; and according to settled rule, the objection comes too late after verdict. This view of the subject puts the case on the footing of an action on the case, and it may become a question whether the verdict found by the jury will entitle the plaintiff to his costs, but it is unnecessary now to consider it.

Motion refused.

Gantt, Bay, Nott, Colcock, Huger, justices, concurred.

Gadsen, for the motion.

Hunt, contra.



C. WEYMAN, & J. T. WEYMAN, *executor and executrix of*
S. GALE, *vs.* JOHN MURDOCK, *executor Z. Miller.*

Process by attachment will not lie against an absent executor or administrator.

An order was made to quash the proceedings in this case, on the ground that an *attachment* will not lie against an absent executor, for a debt which was due by the testator; and an appeal taken from that order.

Gilchrist, for the motion. The attachment is a proceeding *in rem*, and was intended to come in stead of the proceeding

C. & J. T. WEYMAN, *vs.* MURDOCK.

in personam, when the defendant cannot be found. If the executor were within the state, he would be proceeded against personally, as a debtor, though in a representative capacity; and when absent, there is no reason why the proceeding by attachment should not apply to him.

If the attachment will not lie, there is no remedy for the creditors of estates, in the absence of the executor; for in the case of *Griffith vs. Frazier*, 3, *Cranch*, 9 to 21, it was decided, that the ordinary could not grant administration, during the absence of the executor.

King, contra. By the attachment act, the process can only issue against an *absent debtor*. The executor is not the debtor, it is the debt of his testator, and he is therefore not included. If the plaintiff were without remedy, it would be a matter to be regretted, but this court would not strain its powers, to give him one. The court of Equity, however, has the power and will relieve; that court can impound the property, until the executor account for his administration. The courts of New-York and Pennsylvania, have decided, that an attachment will not lie against an executor. 2 *Dallas*, 73, 97; 1 *Johns. ca.* 372. See also the case of *Warwick vs. the adm'r. of Telfair*, decided in this court, Jan. 1822. *Journals Con. Court.*

According to the adjudications on the subject, an attachment has an effect in binding the property, and giving a preference to the attaching creditor; and if it were allowed against executors, would wholly defeat the act of the legislature, prescribing the mode of marshalling assets.

Clarke, in reply. The words of the act of assembly are very broad, and include all descriptions of persons who are, in way, debtors. It is no objection that this proceeding will derange the order in which executors are directed to pay debts. An executor, when he undertakes the office, should know what it requires of him. It is his own fault, if one creditor obtains a preference to the injury of others, and no doubt he will be individually liable to make it good. If Equity can give relief in such a case, it is he who should be sent there to seek it.

The opinion of the court, was delivered by Mr. Justice Bay.

The point submitted in this case is, whether a writ of attachment will lie against an executor, who is out of the limits of

C. & J. T. Weyman, vs. MURDOCK.

the state. Upon consideration of the above case, I am clearly of opinion that a writ of attachment under our act, will not lie against an executor or administrator, for they represent deceased persons, for whose debts they are not in any wise responsible. The terms of our act, confine its operations to absent debtors only, who are originally responsible in their own right; and the attaching their estates and effects is only a mode to make them come in and answer for their own debts: the whole of the proceedings from the first process to the final judgment and execution, are confined to the absent debtor only. On the contrary, an executor or an administrator is not the *debtor*; consequently, the writ of attachment can never reach or attach upon either of them. In *2d Dallas*, 73 and 97, it is laid down that executors, administrators and trustees are not liable to the writ of attachment, as they all act in a representative capacity; and in this court, in 1801, an attachment which had been issued against an executor was withdrawn, because the court thought it would not lie; and from that day to the present time, there is no trace of an attachment against an executor or administrator, to be found on the records of our court. Besides, it would derange the whole course of administration and marshalling of assets, if an attachment were permitted to bind, or take away the property of a deceased person out of the hands of an executor or administrator, and prevent him from paying the debts of the testator or intestate according to law. The attachment law is a proceeding in rem, agreeably to the civil law, unknown to the common law; and in all such newly created proceedings, the rule of law is, that they shall be carried on strictly within the letter of the law, and shall not be allowed any other or further powers by construction or intendment, than are expressly given by the act creating them.

I am, therefore, of opinion that the motion should be refused.—*Colcock, Nott, Gantt, Johnson & Huger*, Justices, concurred.

Clarke & Gilchrist, for motion.

King, contra.

SIMON MAIRS and sundry other creditors, vs. ELIZA SMITH.

Petitioner for the benefit of the "Insolvent Debtor's Act," caused her goods to be secretly removed, with intent to defraud her creditors. They were afterwards recovered by the creditors and sold for their benefit. Held that the attempt to defraud did not deprive her of the right to the benefit of the act.

THIS was a motion to discharge the defendant under the act for the relief of insolvent debtors; which was opposed by the creditors on the ground of fraud: and they filed a suggestion containing various charges against her, and produced a number of affidavits in support of them, which induced the court to send the case to a jury; who found her guilty of the second allegation in the suggestion; namely, that she the said Eliza Smith, "fraudulently, secretly, and in the night time, and with intent to defraud her creditors, caused a portion of her goods to be cloigned and removed from her store in King street, and secreted in a distant part of the city and placed under the direction of others." There were other grounds stated in the suggestion, but the jury only found her guilty of the second charge or allegation. Several witnesses were produced and sworn, on the part of the creditors, who proved substantially, that after she had been taken and imprisoned on the different executions against her body, and while she was in confinement, she sent one Phillips, a person in whom she confided and with whom she entrusted the keys of her house or store, to take out privately a quantity of her goods, to raise money for her support and to fee lawyers. That Phillips did go to the said store, at different times, in a private and secret manner, and did take out of her store six boxes of merchandize, which he carried to his own house, on Sunday evening, about the middle of June last, and afterwards deposited them for safe keeping with a neighbour. Afterwards, on Sunday morning, about day light, on or about the 4th July last, he packed up a rice cask of goods, which he sent to Mr. Sibley's auction establishment in King-street, to be sold for her use. But it came out in evidence, that by the vigilance of the creditors, these goods thus taken away, were traced out and found by the creditors, before any part of them were disposed of for her use, and the whole, including the six boxes and the rice cask of goods, were delivered up to the creditors and afterwards sold for their account. Phillips, who acted as her agent

MAIRS, vs. SMITH.

in the transaction, swore that every article he took out of her store, was delivered up for the use of the creditors and nothing was eventually withheld from them; and it did not appear from any part of the testimony given, that any other part of her property had been concealed or withheld from her creditors; but that the whole had been sold under various executions for their benefit. The presiding judge, ordered her recommitment and from this order an appeal was taken.

Pepoon, for the motion, argued 1st. That the allegation on which the petitioner has been convicted, will not, if true, exclude her from the benefit of the act. An attempt to commit fraud, is not a fraud. If this be termed a fraud, it is one which has occasioned no injury to creditors, nor have they on that ground, a claim to oppose the petitioner's discharge.

2d. The judge before whom the petition was brought, thought the defendant entitled to her discharge; but felt himself restrained from ordering it, by the finding of the jury. But it was unnecessary to submit the matter to a jury. By the terms of the act, (1st. clause,) the judge is to decide. It directs that "the court" shall inquire, and if "the court" be satisfied shall discharge.

A misapprehension has arisen from confounding the provisions of the *Prison Bounds Act*, with those of the act under which this application is made. The rendering of a false schedule excludes from the benefits of that act; the fraudulent withholding of property is the offence which prevents the petitioner's availing himself of this. That requires the schedule to be sworn to, which is not required by this act.

Frost, contra. The allegation and finding of the jury, are that the goods were removed with a fraudulent intention. Upon the removal's being effected, the fraud was complete; nor do I perceive how a recovery of the goods by the creditors can annul it. It is taken for granted, in argument, that the whole of the goods secreted by her were restored; but this was a fact, from its nature incapable of proof, and I think the jury were well warranted in concluding otherwise. From the whole act, taken together, it is apparent that the burthen of proof is thrown on the petitioner: the court must be satisfied that the whole of his property has been surrendered. Can the court be satisfied

MAIRS, vs. SMITH.

Of this, in the present case? The act considers fraud not as a civil injury, for which satisfaction may be made by a restoration of the property, but as an *offence*, for which the penalty of imprisonment is inflicted.

Pepoon, in reply. Referred again to the act, for the purpose of shewing that the fact of property's being withheld, at the time of the application, furnishes the ground for remanding the petitioner, and that after being remanded, he may entitle himself to his discharge, by fairly surrendering his property, to the satisfaction of the court.

The opinion of the Court was delivered by Mr. Justice Bay.

From the view which I have taken of the case, I am clearly of opinion there is nothing now to prevent petitioner's discharge under our insolvent debtor's law, upon taking the oath required by the act and complying with the other usual requisites of the same. Our insolvent debtor's act, is a remedial law for unfortunate debtors who are incapable of paying their debts from misfortunes and losses in trade or otherwise, and ought to have a liberal construction. In all cases where a debtor gives up all his estate, real and personal, for the benefit of those to whom he stands indebted, he is entitled to his discharge. But in all cases where an actual fraud has been committed, and a debtor has concealed or sent away his goods or property, so as to place them beyond the reach of his creditors and to deprive them of their value, the law will not and ought not to screen him, or set him at liberty; as was determined in this court some years ago, in the case of *Napier vs. Smith*, who had sent away twenty or thirty negroes, to East Florida, to place them out of the reach of his creditors. In that case, the court refused to discharge him until he sent on an agent and brought them back, and delivered them up. So, in the present case, although Mrs. Smith may have intended to conceal and withhold from the creditors, the six boxes and the rice cask of merchandize, and in a moral point of view may be said to have committed a fraud; yet in a legal point of view the fraud was prevented, and the whole of the goods were given up and sold for the benefit of the creditors. An *intent* to do an illegal act will not in law constitute an offence, unless it is eventually perpetrated; and the jury in this case have only found by their verdict, that

MILLER, *vs.* LANGTON.

she had caused these goods to be taken away in the night time with intent to defraud her creditors. They have not convicted her of an actual fraud, nor could not, as the whole of the goods were eventually delivered up. I am, therefore, of opinion that this verdict of the jury, of itself, is not such a finding in law as will deprive her of the benefit of the act, after the testimony which has been given in this case in her favor.

Nott, Gantt, Johnson, Justices, concurred.

Pepoon, for the motion.

Frost, contra.

ANDREW MILLER, *vs.* JOHN LANGTON.

The death of Plaintiff in replevin abates the suit: nor will a writ, de retorno habendo, be awarded on such abatement.

In this case, a judgment was entered up in the court of Common Pleas, in favor of John Langton, the avowant in replevin; but previously to the verdict and after avowry, Andrew Miller, the plaintiff in replevin, had died. The defendant, considering himself entitled to a verdict, proved his demand before the jury and in due time issued his writ *de retorno habendo*. A motion was afterwards made before Judge Gantt, in January term, 1823, to quash the proceedings; on the ground that by the death of the plaintiff in replevin, the suit abated. The presiding judge decided in favor of the motion, and ordered the judgment in replevin to be set aside. A motion was now made to reverse the decision, on the following grounds:

1st. That an action of replevin does not abate by the death of the plaintiff.

2nd. That the decision of the presiding judge was, in other respects, contrary to law.

The opinion of the Court was delivered by Mr. Justice Colcock.

I can discover nothing in the nature of this action, or in the doctrine on the subject of replevin, either under the various statutes, or under the common law, which will make the action of replevin an exception to the general rule, that where a plaintiff dies the suit abates; see *Chitty*, 436. It is an action of trespass, for taking goods, which the plaintiff alleges were

MILLER, vs. LANGTON.

his, and were illegally taken. Now the merits of a case have nothing to do with a question of abatement. Whether the facts alleged were true or not, the court cannot determine in this collateral manner. When the plaintiff replevies his goods, he gives bond to prosecute his suit or redeliver the goods distrained. The goods are restored and the parties placed in the same situation in which they were before the distress. The defendant loses no right by the abatement of the action; he is only in the situation of any other person prosecuting a right. By the death of his opponent he is delayed, and I can discover no greater injury resulting to him than results in every other case of abatement. If an action be brought on his bond, no recovery can be had, for he cannot be non-suited after his death. "Plaintiff in replevin, having given a bond to prosecute his suit with effect, levied a plaint against the defendant, who obtained an injunction to stay proceedings until a certain day, on which the plaintiff in replevin died; it was adjudged that the plaintiff had prosecuted his suit with effect; there not having been either a non-suit or a verdict against him; and Holt, C. J. compared it to the case of a recognizance on a writ of error, which was to prosecute with effect; where, if the plaintiff was not non-suited, nor the judgment affirmed, the recognizance was not forfeited." *Selwin N. P.* 1117. So in the case of *Cutfield vs. Coney et al.* 2 *Wilson's Rep.* 83; after plaintiff in replevin had declared, he died before the defendant had made any avowry, so that the suit was abated by the act of God; whereupon it was moved that the defendant have a writ *de retorno habendo*. But the court decided that it would be unjust; for that writ could only be awarded on a determination of the merits, and its being made to appear that the taking was lawful. This is not like the case of *Talvande vs. Cripps and others*; there the defendants were substituted; but the case required no support from the peculiar nature of the action. It was a case where there were two defendants; and the death of one did not abate the action. 1st. *Chitty*, 436; at least this was my view of it.

The motion is dismissed.

Bay, Gantt, Johnson, Justices, concurred.

Cogdell & Gilchrist, for motion.

Prigden, contra.

HENRY P. HOLMES, vs. BENJAMIN F. HARD.

Trover for a boat. Defence, that defendant had taken her up adrift and had a lien for salvage and repairs; which plaintiff had promised to pay to the amount of forty dollars. No proof of defendant's having saved the boat, but plaintiff's promise. Held that defendant had no claim for salvage; that if he had, it would not have authorized him to repair, and that plaintiff's promise gave him no lien.

THIS was an action of trover, to recover the value of a row-boat. It was proved that plaintiff had been seen in possession of the boat and that her value was from \$150 to \$200. A letter from defendant to plaintiff was produced in evidence, to supersede the necessity of proving demand and refusal. The letter required plaintiff to pay what he had promised as salvage and repairs on the boat, or she should be sold. The defence was, that defendant, after the severe gale of 1813, found the boat nearly stove to pieces, and in a very perilous situation, on an uninhabited hammock; that he got her off; put repairs on her sufficient to float her to Charleston and advertised her; that plaintiff called to see her, and said the boat was the property of a widow lady; that he would pay for the salvage and repairs, which was agreed upon at \$40, and would receive the boat. That having neglected to pay for a long time, defendant by letter informed him he must pay immediately or the boat would be sold to defray expenses. Plaintiff again promised, but did not pay; and the boat was sold at public auction for \$25. The defendant contended that he had a lien for salvage and repairs on the boat; that if he had not such lien by law, that the contract with plaintiff for \$40 gave him a lien; that there was no sufficient evidence of plaintiff's right of property in the boat, nor of her value, nor evidence of a demand and refusal. The presiding judge charged on all the grounds in favor of the plaintiff, and the jury found a verdict for plaintiff for \$—. A motion for a new trial was now made on the following grounds:

1st. That the presiding judge misdirected the jury, in charging that the defendant had no right of salvage in this case.

2d. That he misdirected them, in charging that defendant had no lien on the boat in question, and had no right to sell her for the satisfaction of a lien.

HOLMES, vs. HARD.

3rd. That he misdirected them, in charging that the evidence of conversion was not rebutted by the lien.

4th. That the verdict was contrary to the preponderance of testimony, as to the value of the boat, and otherwise contrary to law.

The opinion of the Court was delivered by Mr. Justice Colcock.

Upon the first ground, little need be said. I think it must be the first time that ever a claim of salvage was set up for taking up a drifted canoe. Salvage is a reward for saving a vessel or cargo abandoned at sea or shipwrecked. But if the cause had been a subject of salvage, the first point to be decided would be, that the defendant had saved the canoe. Now the only testimony on this point was, that the witness saw a canal boat high and dry on Lightwood's Island, which he seemed to say, or which it was contended, was the canoe in question. The jury were, however, to determine on this point. I suppose they viewed it as I did, as a feeble effort of the defendant to shew that he came properly into the possession of the boat. On the second ground; the law is equally clear against the defendant; where goods are placed in the hands of a person which he is obliged to receive, there he is entitled to retain them for his indemnity; upon which principle it is that common carriers and inn-keepers have a lien on the goods delivered to them. So if work is to be done or performed, and there is no special agreement as to price, they may be retained. But here, it is not even pretended that the boat was placed in defendant's hands; his only pretence is that he found her adrift. Now this would not give him a right to repair, not even if it was a subject of salvage. The subsequent agreement to pay \$40 might have entitled the defendant to an action for so much, but did not give him a lien. The third ground is disposed of by shewing that the defendant had no lien on the boat. But little was said on this point; for the conversion was too clear to admit a doubt. The taking was unauthorized, and consequently the sale illegal. As to the last ground, one witness swore that the boat was worth \$150, or \$200, and of course the jury are authorized by that evidence to find the verdict. But I have no doubt they thought the defendant's conduct improper and vexatious, and were,

NICKS, vs. MARTINDALE.

therefore, disposed to make him pay the full amount of damages which the plaintiff had sustained. The motion is dismissed.

Richardson. J.

I concur on the ground, that supposing the defendant to have had a lien on the boat, yet he had no right to sell her.

Nott, Johnson, Gantt, Justices, concurred.

Huger, Justice.—I dissent, there was no right of property in the plaintiff.

Ford and Desaussure, for motion.

Holmes, contra.



JOSEPH D. NICKS, administrator of Richard Fair, vs. JAMES C. MARTINDALE.

The statute of limitations, which had begun to run against an intestate, is not, after his death, suspended until administration granted.

THIS was an action on an open account, the last item of which is dated the 7th October, 1815. The defendant filed his pleas of the general issue and the statute of limitations. To the former plea the plaintiff joined issue, and to the latter replied, that although it was more than four years between the date of the last item of the account and the day of the commencement of the suit, yet that the said Richard Fair departed this life on the 17th day of October, 1817, and no administration was granted on his estate until the 7th day of November following, during which period of twenty-three days, no suit could be commenced against the defendant; and that the defendant, during a part of the period between the date of the last item in the account and the commencement of the action, to wit, from December 24th, 1818, to 29th February, 1820, was himself administrator of all and singular the goods and chattels, rights and credits which were of the said Richard at the time of his death, and which had been left unadministered by Elizabeth Fair, administratrix thereof; within which said interval, no suit could be commenced by the said defendant, as administrator, against himself, upon his said promises and assumptions to the said Richard, and that he, the said Joseph, administrator as

NICKS, vs. MARTINDALE.

aforesaid, commenced his suit thereupon against the said James C. Martindale, within four years next after the said promises and assumptions of the said James C. (the said period of twenty-three days, and the further period of the said James C's administration being excepted out of the four years, within which a suit might have and ought to have been commenced against the said James C.) To this replication, defendant demurred and plaintiff joined in demurrer, and the same were filed on 29th March, 1822. Upon the argument, the presiding judge decided in favor of the demurrer, and a motion to reverse that decision was now made on the following grounds:

1st. Because by law, the representative of a deceased creditor is allowed a reasonable time to commence suits for the recovery of debts due the estate, and that this time, therefore, is to be deducted from the four years limited by the statute.

2d. Because it is the settled law, that no action can be commenced till administration, and as the law prohibits the bringing of the action during this period, it must be excepted out of the calculation of the said four years limited by statute.

3d. That it is immaterial at what time within the four years the creditor dies, whether at the beginning, the middle or the close of the same.

Grimke, for the motion. The representative of a deceased creditor, is always allowed a reasonable time to bring suits *Tidd's Prac.* 26, 27; *Bull, Ni. Pri.* 150; 6 *Co. Rep.* 10, *Spencer's case*; *Cowp.* 738, 740; 2 *Vern*, 695. If there is no executor nor administrator, the statute will not run against the creditor of an estate; and what makes the distinction between an estate plaintiff or defendant? 3 *Caines* 206; 1 *Wash* 362; 2 *Str.* 907; 2 *Hawn*, 147.

The rule is, if there is a disability to sue, the statute shall be suspended. Now certainly the defendant during his administration could not sue himself, though it was his duty to have paid the debt. (*Dunkin*. We concede that the period of defendant's administration shall be left out of the calculation; the statute will still have run, unless you can show that the twenty three days, during which there was no administration, should also be excepted.) There is a difference between the case of an executor and an administrator. If there be an executor, he

NICKS, vs. MARTINDALE.

may sue, though he have not qualified or proved the will. If no executor, there is no one qualified to sue, until administration granted.

This court has decided that the act of '89, exempting executors and administrators from suit for nine months, suspends the act of limitations as to creditors of estates. Yet that act does not expressly repeal or modify the statute of limitations, such modification is inferred from the disability imposed on creditors. And even that disability is not absolute: the creditor may sue if he will, and the suit will be sustained, unless the executor or administrator avail himself of his exemption by a particular plea. And in some cases he is permitted to sue indirectly, and recover his demand by way of discount, in a suit brought by the executor or administrator. So war suspends the statute as to alien enemies: yet these are not absolutely disabled; the defendant may avail himself of their hostile relation if he will. *2 Nott & Mc Cord*, 498.

In all these cases, the court has held the statute to be suspended, by construction, from the inability to sue. But where there is no executor nor administration granted, the estate is not represented at all; the inability to sue is absolute and total.

Dunlin, contra. Many of the cases cited shew that an executor or administrator may, within a reasonable period, renew a suit which has been commenced by the testator or intestate, and that the statute shall not run in the mean time. But that is considered a continuation of the same suit, and has no relation to the question before the court. The case of *Adamson vs. Smith*, *2 Con. Rep.* 269, has settled, that when the statute once begins to run, it shall not be suspended by any supervening incapacity. The court has, in some cases, construed the statute to be suspended, where there was a disability to sue on the part of the plaintiff: but here there was no disability; for administration might have been taken out and a suit commenced in proper time; and it was the fault of those interested in the estate if they neglected to do so. The objects of the statute would be in a good measure defeated, if demands might be kept alive an indefinite number of years, by neglecting to take out administration.

NICKS, vs. MARTINDALE.

The opinion of the Court was delivered by Mr. Justice Colcock.

The general rule on this subject is, that when the statute begins to run, it shall not be impeded in its operation by any disabilities. But to this rule there are exceptions, some of which are enumerated in the statute, and one or two which arise from a construction of the statute. There is certainly nothing in the act itself which will authorize the court in saying that its operation shall be suspended until administration granted; nor can this be brought within any reasonable or just construction of the act. Where, by positive enactment, one is prevented from suing or being sued, it is reasonable to say the operation of the statute shall be suspended; but where the fault lies with the party himself whose rights are affected, this reason does not operate. This court has decided that the clause in the executor's act which says, an action shall not be brought against the estate of a deceased person for nine months, is a suspension for that time of the statute; and so where, by the common law, an alien enemy is prevented from suing, the statute is suspended during the war; and so upon an equitable construction of the statute of James, it has been held, that an executor or administrator may be permitted to renew a suit within a year after the death of testator or intestate who had sued in his life time, even if the six years expire during that time; in all of which cases, it is clear the law only suspends the operation of the statute, where the party has been prevented from, or delayed in the prosecution of a suit. It was contended for the plaintiff, that there is an analogy between the case of the plaintiff and those cases which arise under the statute of 4 Anne, c. 16., where a reasonable time is allowed to the plaintiff after the return of his debtor; but the analogy furnishes an argument against the plaintiff; for in such cases he is required to sue as soon as he learns that the debtor is returned; and here it is clear that the plaintiff might have proceeded earlier than he did. He might have administered sooner, and he failed to sue for nine months and more after administration granted to him. But to what consequences might this lead? Administration might not be taken out for years, and thus claims kept alive contrary to the very policy of the statute, until all evidence of payment

THE STATE, *vs.* HUGGINS.

be lost. I am not inclined to multiply the exceptions to the statute; I think it has been very properly called a statute of repose, and that it is a good shield against dishonest claims. If occasionally a just debt is lost by its operation, it can only be by the inattention of those to whom it is due.

The motion is dismissed.

Nott, Gantt, Johnson, Richardson, Huger, Justices, concurred.

Hayne and Grimke, for motion.

Dunlin, contra.

THE STATE *vs.* CHARLES HUGGINS.

Of eighteen managers of elections, appointed by the legislature, in the District of Georgetown, two had refused to qualify; one was dead, and one disqualified to serve by being a candidate: Held that eight of the remaining fourteen, properly formed a board to determine on the validity of a contested election of sheriff; a majority of the managers qualified to serve, being all that is required by the act of the legislature.

THIS was a motion for a rule against the defendant, to shew cause why an information in the nature of a writ of Quo Warranto, to enquire by what authority he exercised the office of sheriff of Georgetown District, should not be issued against him. The facts on which the motion rests are these. That there are six places of election, established by law, in the judicial district of Georgetown, viz: Georgetown, Santee, Sampit, Pee-Dee, All-Saints and China Grove. That three managers were nominated by the legislature for each of these places, making in all eighteen. That Benjamin Grove, senr. one of those nominated for the place at All-Saints, was dead, and had died before the election. That John White, who was also nominated as a manager, was a candidate for the office of sheriff, and was disqualified by the provisions of the act, regulating the manner and mode of electing sheriffs, and that William F. Heriot and B. Green, jr. two others of those who were nominated as managers, refused to act some time before the election. Deducting these from the eighteen nominated as managers by the legislature, there remained fourteen acting managers for the

THE STATE, *vs.* HUGGINS.

district. That the election was conducted by two managers at Georgetown, two at Santee, two at Sampit, two at Pee-Dee, one at All Saints and two at China Grove, including Mr. Daniel G. Scott, who was not nominated by the legislature and had no authority to act. Of which number, eight besides Mr. Scott, met to count the votes and declare the election. Upon which Robert Thurston, who had been a candidate, gave notice of appeal as the law directs. The said eight managers then formed a board to hear and determine the said appeal, and after a full and deliberate hearing, determined that Charles Huggins was duly elected; seven of the eight signed that return, which was forthwith transmitted to the governor, who commissioned the incumbent. On hearing argument in the court below, the presiding judge dismissed the rule. A motion was now made to reverse that decision on the following ground:

1st. That the board of managers was not properly organized, and ought to have consisted of, at least, a majority of the whole number of managers.

2d. Because the contesting candidate had not waived his right to object to the competency of the board, by submitting the case to them.

King, for the motion. This court exercises a general supervising power over all inferior jurisdictions; and however ample may be the powers of the board of managers, it must appear that the board was properly organized; otherwise it is not the tribunal constituted by the legislature, but a set of unauthorized individuals which decided.

The rule is, that of bodies organized for private purposes, all the members must join; of those for public purposes, a majority is sufficient to act. *Zinn and Wife vs. Burdell et al. Jeter vs. the Commissioners for Tobacco Inspection*, 1 Bay's Rep. 348.

In the case of *The State vs. Delessieline*, 1 M'Cord, 52, it is laid down, that a majority of the managers shall form a board to decide on contested elections; not of acting managers, but, as I understand it, of the managers appointed by the legislature: of this quorum, a majority shall decide. In the present case, eighteen managers were appointed by the legislature, of whom eight formed the board; and a majority of these, it is

THE STATE, vs. HUGGINS.

contended, had a right to decide. Upon the same grounds, if but six managers had acted, (one at each place of election,) four might formed the board, and the decision of three would have been final—one-sixth of the number originally appointed.

Dunkin, contra. Eighteen managers were originally appointed in the district; of these two refused to qualify, and never were managers; one was dead, and one was disqualified to act by being a candidate: so that, at the time of the election, there were but fourteen managers in the district, of whom a majority formed the board: and this was sufficient, according to the decision in the case of the State, vs. Delessieline.

If necessary, I should contend that a majority of the managers who, in fact, held the election, are sufficient. "A majority of managers shall constitute the board." Of what managers? Those who acted in holding the election. Nor do I perceive what inconvenience is likely to result from a small number having the power to decide. Less, unquestionably, than from requiring a majority of the whole where a very large number has been appointed for a district: As in Charleston, where of thirty-nine managers, twenty would be requisite to form a board. This absurdity too, might result: If nineteen should meet and unanimously declare the election valid, their decision would be null: if the twenty meet, the decision of eleven will be conclusive.

The opinion of the Court was delivered by Mr. Justice Colcock.

This fruitful source of litigation, I hope, is now nearly exhausted, and that at length the intention of the legislature, to give the elections to the people, and the final determination as to their validity to the managers, is like to be accomplished. The objection now made to the competency of the court is, that a majority of the whole number of managers nominated by the legislature, did not sit and determine the election. In the first place, I ask on what principle is it, that where a public authority is delegated to any number, less than the whole may act? The answer is obvious, necessity and public convenience. Now if necessity and public convenience may require that where all the managers of these elections are alive and have qualified, a majority may act; does not the same reason operate

THE STATE, vs. HUGGINS.

to authorize the managers of an election to act, where some of those who have been nominated, are dead or have not qualified. The elaborate opinion which was delivered by my brother Nott, in the case of Deliesseline, renders it unnecessary for me to go at large into the investigation of this doctrine. He has there shewn, that where a quorum is fixed by law, in many cases, less than a majority have been deemed sufficient to constitute such quorum, and also the consent of those who do not act is sometimes implied. In short, that the doctrine is not settled upon fixed and established principles. But if the general rule could be considered as established, there certainly may be cases, where from the provisions of the law, the nature of the duty to be performed and a variety of other circumstances, it might be clearly shewn that it was not intended that a majority should be required; and such is unquestionably the case now presented for consideration. The act regulating the mode of electing sheriffs, declares that the elections shall be conducted in the same manner as those for members of the general assembly, and by the same managers. In the act, 77 section of *Brevard, Title Sheriff*, it is laid down "that all laws regulating the election of members to the general assembly, shall apply to the elections by this act prescribed to be held for the office of sheriff," and the power is given generally to the managers of each district, although in some, the number is twice as great as in others: and although the legislature have appointed three managers to each place of election, it has been repeatedly decided that one manager is sufficient to hold a poll, and that the only object in appointing three, was to ensure to the people an opportunity to vote. In the execution of this power, it is well known to every member of the legislature, that all the managers of a district never meet at the counting of the votes. Sometimes the votes of one place are sent to the place of general meeting by an indifferent person, not one of the managers of the poll attending; and, further, that members of that body are daily suffered to take their seats, with a return of one third, or even less of the managers. From all which it may be deduced:

1st. That the legislature, in passing the act, had no regard to numbers; that they meant to commit the matter to the managers, or so many as should act;

THE STATE, vs. HUGGINS.

2d. That they intended the elections of sheriffs to be conducted as they well knew the elections for members to the legislature were conducted; and again, that they meant that the final determination should be made by those who should meet to count the votes and declare the election. For the act further provides, that when they meet to declare the election, if any one is dissatisfied, he shall on that day, and in writing, give notice to the said managers: What managers? To whom could he give notice in writing, and on that day, but to those who were present? Which said managers shall form themselves into a board, to hear and determine the matter: What managers? Those who are present and notified. I might descend to other particulars: the season of the year; the usual unhealthiness of that season; the time which it requires for the managers to collect on the day on which the votes are counted, &c. But, I think, enough has been said to shew the intention of the legislature. The objection to this reason is, that it may give to a very few of the managers, the final determination of this matter, and the objection is stated with great earnestness and some appearance of alarm. For my own part, lead where it may, I am ready to follow; nor do I stand alone. I am satisfied that the legislature intended to provide a speedy determination of the matter, and that they thought it of more importance that there should be a determination, than that that determination should be right. But what cause of alarm can exist? When we look to the duty to be performed, I venture to say, it is one of the most simple in which any operation of mind can be required. In fact, it is a duty which might be as well performed by any one plain man as by forty, and I have no doubt with as much security to the public welfare. But a majority of my brethren think it sufficient to determine the case before us; I shall therefore, say nothing as to the number which I think may determine on the validity of an election. By law, the managers of elections are required to take an oath before they act. The mere nomination of the legislature, therefore, does not make one a manager. There were then in reality only fourteen managers in this district at the time of the election; so that upon the whole, it is manifest that the legislature meant at least to commit this matter to the acting managers in each district; a majority of whom having in the case before us

WALLIS, vs. NELSON.

formed themselves into a board, were legally authorized to hear and determine the case. But as I suggested below, if this view were not taken, I am at a loss to perceive any reason for granting a rule in this case. For this court could not pronounce a judgment of ouster against the incumbent, who is in office by the commission of the governor, without some evidence that he had not been duly elected; and after the decision in the case of Green & Shackelford, I am at a loss to perceive how that information could be obtained.

Motion dismissed.—*Gantt, Johnson, Richardson and Huger*, Justices, concurred.

King, for motion.

Dunkin, contra.



JOHN WALLIS vs. NELSON.

Action by indorsee against indorser of a note. Defendant gave notice of an intention to offer himself as a witness, to prove usury. To prevent this, plaintiff offered himself as a witness, and swore that he obtained the note for a full consideration of one D. Defendant was then examined and swore that he endorsed the note, for the accommodation of the maker, and passed it to D, at an usurious discount. D, being then examined, denied the usury sworn to by defendant. Held, that under the provisions of the statute of usury, defendant was an incompetent witness, and new trial granted for that cause.

THIS was an action of assumpsit, on a note drawn by one Happoldt and made payable to the defendant, Nelson, who endorsed it; and it was afterwards indorsed by one Christopher Happoldt. Plaintiff afterwards got it into his possession and brought this action for its recovery. The defence was *usury*; and the usual notice was given to the plaintiff by defendant, that he should avail himself of the benefit of the provisions of the usury act, and offer his own evidence at the trial. The plaintiff, to prevent the defendant's being sworn, tendered, under the provisions of the act, his own evidence, and was accordingly sworn.

He swore that he got the note in question from one Dunn, to whom he had paid the full value, and that there was no usury, to his knowledge, in the transaction; but that he was ignorant

WALLIS, vs. NELSON.

of what had passed between the parties to the original transaction. The defendant then offered his own evidence, which was objected to, on the ground that the plaintiff having sworn there was no usury to his knowledge in the transaction, the defendant could not be sworn under the provisions of the act. The court overruled the objection and permitted the defendant to be sworn, who stated that the note had been drawn by Happoldt and endorsed by himself, to raise money, and that it was taken at an usurious discount by Dunn; who refused positively to advance the money, until the note was endorsed by the witness. Dunn was then called by the plaintiff and sworn. He stated that he had got full value for the note from the plaintiff and had given full value for it to the defendant, for Happoldt, and there was no usury in any stage of the transaction. Dunn's name was not on the note. Under the charge of the court, the jury found a verdict for defendant. The plaintiff now moved for a new trial on the ground, that the defendant's evidence was improperly received.

Hunt, for the motion. It is evident, that the statute of usury only had reference to actions, between the original borrower and lender, and intended to permit the defendant to give evidence, in cases where the truth of the transaction was supposed to be known to the plaintiff, and he refused to swear. The terms of the act are "as such transactions are generally carried on where only borrower and lender are present together," &c. "be it enacted," &c. "that the borrower or party," which by a very natural construction may be made "borrower who is a party," shall be a good witness. "Unless the person or persons against whom such evidence is offered, will deny upon oath in open court, the truth of what such evidence offers to swear against him." What else can the defendant in any such action swear *against the plaintiff*, but the fact of usury? Which if the plaintiff will deny; will deny that *he* has practised usury; the defendant is incompetent.

There is reason to believe that Wallis, was the original lender of the money in this case, and that Dunn was only the broker who negotiated; it does not appear, that Dunn paid the money to Happoldt, 'till he had discounted the note with Wallis. Certainly Dunn is not a party to the note, which is

WALLIS, vs. NELSON.

the contract in the case. If this be the fact, it will not make usury in Wallis, that Dunn retained fifty dollars of the money in it's passage through his hands.

[*Nott*, Justice. As Dunn's name does not appear on the note, may not Nelson be regarded as the endorser to Wallis? And if as between them, the contract was fair, is not Wallis entitled to recover against *him*, though there may have been usury between Happoldt and Dunn, as if a note be drawn by A. and endorsed, upon a usurious consideration, by B. to C, who endorses and discounts it bona fide, in bank; is not C. liable on his indorsement as a new and valid contract?]

Even admitting however, that the transaction was usurious on the part of Wallis, and that he committed perjury, yet if he was the lender, the defendant Nelson was an incompetent witness, for Wallis denied the usury. In such case, if plaintiff swear falsely, defendant has no remedy but to prosecute for perjury. If Wallis was not the lender, still the defendant was incompetent; for I have endeavoured to shew that by the act, only the party to the usurious contract, defendant, is permitted to give evidence against the party plaintiff. The consistent and sensible construction of the act is, that if the plaintiff will deny usury *on his part*, the defendant shall not be admitted to prove it. The result will be; that although an assignable instrument, like the one now sued on, is void as against those who became parties to it on a usurious transaction, yet in the hands of an innocent and bona fide holder, it cannot be proved so by the defendant's own testimony.

In the case of the *executors of Thomas vs. Brown*, 1 *McCord*, 557, the defendant was admitted to prove the usury; where the party to the usurious contract was dead. There the plaintiffs neither did nor could offer to deny the usury, on the part of him they represented. Here the party to the contract charged to be usurious, whether it were Wallis or Dunn, was living, and was examined on oath, and denied the usury. Were cited, *Putnam vs. Churchill*, 4 *Mass. Rep.* 516; *Binney vs. Merchant*, 6 *Mass. Rep.* 190; 3 *Day's cases*, 268; *Wilkie vs. Roosevelt*, 3 *Johns. Rep.* 206.

Desaussure, contra. The defendant Nelson, was certainly not the endorser to Wallis, for there is a subsequent endorser Christopher Happoldt. In cases of this sort, the court will look

WALLIS, vs. NELSON.

through appearances. Nelson became a party to this note on a usurious transaction. No doubt a party who takes a note, which is void for usury, may indorse it, bona fide, and become liable on the new contract, which is not infected with the original taint. Such was the case of Fleming and Mulligan, 2 *McCord*, 176. If Wallis obtained the note bona fide, he obtained it of Dunn, and against him no doubt he had a good right of action.

The legislature manifestly regarded the statute against usury as a remedial act; and it must be liberally construed in suppression of the mischief intended to be remedied. It makes the "borrower or party," a competent witness; that is, the party from whom the usurious rate of interest is demanded. Is not the usurious rate of interest demanded of the defendant in this case? By his indorsement, he became liable to pay six hundred dollars and received five hundred and fifty. The law removes in this instance, the general incompetency of a witness in his own cause. This, the case of the executors of Thomas vs. Brown, shews; defendant is competent, unless plaintiff knows the transaction, and will deny all the circumstances which he offers to swear, not deny generally that he knew of or practised usury, but submit to examination and deny in detail.

It is argued that if Wallis was not the lender, Dunn was; that he knew all the facts and denied what defendant swore. This argument would have been applicable, if when Nelson offered to swear, Dunn had been offered to contradict him. But this was not done, and Nelson was certainly a competent witness when he was sworn; he was not objected to, on the ground that Dunn was the proper witness to preclude him. The testimony of both went to the jury, to whom it belonged to decide between them, and they found, no doubt most correctly, that it was a case of usury. Were cited, *Jones vs. Hale*, 2 *Johns. ca.* —, *Lightner vs. Hagood*, 2 *Bay*, 178; *Wilkes vs. Brummer & wife*, 2 *McCord*, 178.

Hunt, in reply. Nelson was introduced to make himself a competent witness, first to prove Dunn the lender and then to prove the usury. But for his testimony Wallis would have appeared the lender.

The opinion of the Court was delivered by Mr. Justice Huger.

WALLIS, vs. NELSON.

The usury act declares "that whereas it is to be feared that evil minded persons" &c. may violate that act, "from the hope that their offences may not "be discovered for want of proof, as such transactions are generally carried on where only borrower and lender are present together; for remedy whereof, it is enacted, that whenever any suit is depending touching any usurious bond, specialty, contract, promise or agreement or taking of usury, the borrower or party to such usurious bond &c. &c. shall be a good and sufficient witness &c. &c. provided that if the person or persons, against whom such evidence is offered, will deny upon oath, in open court, the truth of what such evidence offers to swear against him, then such evidence shall not be admitted to be sworn." Formerly this act was regarded with peculiar favour. Usury was thought an offence not only against the laws of the state, but the laws of Heaven. On this subject, however, public opinion has undergone a most thorough change. It is now only regarded, as *malum prohibitum*, and meets with no other denunciation than is justly and properly due to every offence against the laws of the country.

Whatever, therefore, may have been the rules formerly adopted for the construction of this act, I cannot give my sanction now, to any other mode of interpretation than that which is adopted in the construction of the other acts of the legislature. I cannot consent to inflict the penalties of this act in a doubtful case. It is highly penal and no one should suffer under it, unless he be proved, in the mode prescribed by the laws, to have violated it. If a new mode of proceeding be prescribed by statute, it must be followed, but no further than is necessary to give effect to the plain intention of the legislature. It is, to say no more, in opposition to all our received notions of propriety, to permit a defendant to swear off his debt. The act, however, does, permit this, under particular circumstances. But the very circumstances under which the defendant is permitted to swear, shews the jealousy with which the legislature itself regarded the privilege it was conferring. The borrower, or party to the contract, is not to give evidence, if the person against whom such evidence is offered, will deny upon oath the truth of what such evidence offers to swear against him. The evidence of the borrower appears to have been intended to act in *terrorcm*. The

WALLIS, vs. MELSON.

lender is forewarned that if he does lend, it is at the risk of losing his money by the evidence of defendant, or of adding the crime of perjury to the offence of usury; the alternative is, however, with him; if he choose to deny on oath the truth of what such evidence offers to swear, the borrower shall not be permitted to swear. It is immaterial to the admission of the borrower's evidence, whether the lender swear falsely or not. The plaintiff, in consequence of the notice given, that the defendant would give his evidence if the plaintiff did not, was sworn, and he denied the usury; but it was said that as the circumstances stated by the defendant were not denied, he could be admitted to his evidence. It was certainly not the intention of the act to permit the borrower to swear, unless the lender refused to exculpate himself on oath. In this case the plaintiff, if he were the lender, did exculpate himself; if he were, however, not the lender on usury, Dunn was; and Dunn did exculpate himself on oath in open court as the act requires.

It is said that Dunn's evidence was not offered until the defendant had been sworn. He was, however, objected to as an incompetent witness before he was sworn; but this, at most, is but contending for a form, which may embarrass but cannot aid the administration of justice. It is very much like the old rule which required every objection to the competency of a witness to be made on the *voire dire*, and if once examined in chief, however flagrant his incompetency might appear, he could not be disposed of. The courts have long since adopted a different rule, more convenient and much better calculated, in every respect, to aid the advance of justice. If at any time the incompetency of a witness appear, his evidence must be rejected; see *Dunford and East*, 719; and *Phillips*, 96. Substantially, the provisions of the act were complied with on the part of the plaintiff. The lender did exculpate himself on oath, and the defendant was, therefore, incompetent and ought not to have been received.

The motion must, therefore, be granted.

Nott, Justice, concurred.

Richardson, J. I concur; because my understanding of the evidence of Wallis is, that he denied the usury expressly; and, therefore, the defendant, Nelson, was an incompetent witness under the act.

WALLIS, *vs.* NELSON.

Colcock, Justice.—In this case, there is a difference of opinion, and it is thought important that the view which is entertained of the law, by those of the bench who are opposed to the decision, should be expressed: 1st. Because the decision, it is believed, is in opposition to the adjudged cases of our own courts: 2ndly, Because the decision, as I think I shall clearly shew, destroys the act against usury.

The plaintiff moves for a new trial on the grounds:

1st. That his oath should have been taken as conclusive; and consequently that the defendant should not have been permitted to give evidence:

2nd. That he being an innocent indorsee, ignorant of the consideration for which the note was given, cannot be affected by the usury. (a.)

I shall consider the last ground, first: For if it be established that the plaintiff cannot recover on the endorsement of Nelson, which endorsement was on the note from the first, and on which the money was lent, it follows of course, as I shall shew, that the defendant was properly admitted according to the provisions of the act. In the consideration of the case, the fact of usury is taken for granted; because it is too clear under all the testimony to be doubted by any one and because the jury have so found. The doctrine upon this subject, so far as it has been decided by our courts, being found in a number of adjudged cases, I will take a view of the whole subject; and I am further inclined to this course, because I think on questions where there is such a serious division of the bench, too much labour cannot be expended on a case.

The act against usury, declares that “no person or persons whatsoever, upon any contract, shall take directly or indirectly, for loan of any money, wares, or merchandize, or other commodities whatever, above the value of seven pounds, for the forbearance of one hundred pounds for one year, and so after that rate for a greater or a less sum, or for a larger, or a shorter time; and that all bonds and specialities, contracts, promises and assurances whatsoever, made after the time aforesaid,

(a) This ground does not appear on the brief, or in the opinion of the court. The impression that such a ground was taken, probably originated from a question put by one of the court in the course of the argument.

WALLIS, vs. NELSON.

whereupon or whereby a greater rate of interest shall be reserved or taken, shall be utterly void and of none effect." What was the contract here, and by whom was it made? It was for the loan of money, at the rate of 50 per cent. per annum, and it was made by the defendant; it is a contract whereby a greater rate of interest than that which the law allows has been obtained and consequently, by the provisions of the act, utterly void and of none effect; and yet upon this contract it is said Nelson is to be made to pay the debt.

The object of the statute being to prevent the taking a greater rate of interest than that allowed by law. The most effectual mode of accomplishing the purpose, was to declare the contract void; that is to say, no one shall be made answerable for a debt contracted under such circumstances. But it is said the law only means that this shall be the case as to the parties themselves, and to them alone who make the contract. This exception or limitation is not to be found in the act itself. Where then is it to be found? It is answered in the policy of the law. This cannot be; for it is clear to demonstration that this would at once destroy the law itself; for it is easy to pass such notes at full value as any others, when it is understood that in the hands of a person, ignorant of the usury, they would be binding. Let the usurer put his notes into circulation, and he is safe; again, it is said, it is unjust that a man who pays the full value of a note, without a knowledge of the usury, should lose his debt. The first answer to this is, he does not lose his debt, he who has passed the note to him is responsible to him. But he may be insolvent? This is a common-risk against which the law does not protect. Every man is left free to contract with whom he pleases. If he gives credit to an insolvent man, the fault is his own; and the case of a bad note is like the case of a blind horse; the purchaser is not only not protected against such an imposition, but he is not entitled to commiseration; for the exercise of the faculties which he possesses may protect him against it. It is as easy to inquire of the maker, and indorsers of a note, whether it was given for a valuable consideration, as to try a horse.

The plaintiff then can find no protection in the law itself, none in its policy, nor any in the common protection which the

WALLIS, vs. NELSON.

law thinks proper to afford. Now let us see what the adjudged cases say on this subject; and I begin with our own. In 2 Bay 30, in the case of *Payne & Trezevant*, this very point was made and determined; and the plaintiff was ignorant, as the witness stated, of the original contract between the defendant and Sarcadas, made through the medium of House, the Broker. The court say, admitting Payne to have been an innocent holder, for a valuable consideration; yet as the note was absolutely void in its creation, he cannot recover against the drawer. In 2 *McCord*, p. 178, in the case of *Wills vs. Brummer and Wife*, the same principle applied, even to one of the original parties to the note, is maintained; that ignorance of the usury shall not alter the law; and again in a subsequent case of *Flemming vs. Mulligan*, the very ground, was taken (the fifth) and the opinion on that ground (whether arising out of the facts of that particular case can make no difference, because it is expressly taken and expressly decided on,) is thus expressed, "according to the settled construction of the statute against usury, where unrestricted by any subsequent enactments, a negotiable instrument, if usurious in its original concoction, is void in the hands of a bona fide holder;" and besides the case already noticed from 2d. Bay, other authorities are referred to, in support of this position; the first of which is in 15 Johnson, p. 56, where it was recognized as law, though in the case the doctrine did not apply. The next was the case of *Jones & Hake*, 2 Johns. Ca. 60, where the plaintiff was, as far as appears, an innocent indorsee, and yet the court held that he ought not to recover; the next was the case of *Ackland, vs. Pearce*, 2 Campbell, 599, where it was held that the drawer's ignorance should not alter the law; and lastly, 2 *Phillips on Evidence*, page 13, note, and *Comyn on Usury*, 161 to 182, where all the cases on this subject are collected, and where it is said, in totidem verbis, that "a bona fide holder cannot recover on a bill founded in usury." So neither can he recover upon a bill where the payee's indorsement, through which he must claim, has been made on an usurious contract; and there too will be found the distinction between cases arising under common law, and cases of usury and other cases arising under statutes, declaring such instruments void in their creation. A want of attention to this distinction is, as I

WALLIS, vs. NELSON.

conceive, the cause of the difference of opinion. "Independently," says Mr. Phillips, "of statute provisions, where a negotiable instrument is voidable between the original parties, either by its being founded on a consideration prohibited by the common law, or where it was without consideration at its commencement, it is notwithstanding good in the hands of an indorsee for valuable consideration, without notice." As between immediate parties, those parties between whom there is a privity of contract, the want of consideration or the subsequent discharge of the debt is a valid defence, but an indorsee without notice and for valuable consideration is not affected by fraud or other transactions between the original parties, (to which there are exceptions which are pointed out;) one of the cases referred to will be sufficient; in 5 Mass. 286, a case which the judge supposed to be analogous to the cases of usury and gaming, he says, "though in an action by an innocent indorsee, against the maker of a note, want of consideration or an illegal one, if unknown to the plaintiff, forms no legal defence at common law, yet between the same parties, a consideration illegal by statute and a legislative declaration that the instrument declared on, shall be deemed utterly void, will certainly defeat the action." I refer merely to a few English cases, collected in order, on usury, where the same position is laid down. See page 105, 106.

It has been said, that in the argument of the case of Fleming and Mulligan, it was conceded that the bank where the note had been discounted by Fleming, could have recovered. The concession is again made, and it was therefore that the note came back into the hands of Fleming. His indorsement to the bank, was a new contract for a full consideration, and though written on the back of an usurious note, was not therefore void. But the bank could not have recovered against any of the parties to the original contract, nor would they ever discount a note under the circumstances under which this plaintiff discounted this. If Mr. Dunn had applied to them, I have no hesitation in saying they never would have discounted it for him, without his endorsement, nor indeed can I bring my mind to the belief that any man would do so in an honest transaction. I have said that if it were shewn that the plaintiff could not maintain his action against the defendant, altho' considered as an innocent

WALLIS, vs. NELSON.

indorsee, that it would follow that the defendant was properly admitted as a witness, and I think it has been satisfactorily shewn that both on principle and authority, an innocent indorsee cannot maintain an action on an usurious note, against any of the parties to the usurious contract. I proceed then to the second ground.

The plaintiff did not deny but that the note may have been thus illegally made; all he knew, as he said, was that he gave Dunn a full consideration; he did not know whether there was usury or not. The subject then was open for investigation and the defendant was offered as a witness. How could the court refuse him? The act says, he shall be a competent witness and shall be sworn. The words are "the borrower or party to such usurious bond, &c. shall be and is hereby declared to be a good and sufficient witness in law, provided, that if the person or persons against whom such evidence is offered, will deny upon oath in open court to be administered, the truth of what such evidence offers to swear against him, then such witness shall not be sworn." Now, as there was no denial of what the borrower or party (if he can be distinguished as only a party,) was willing to swear, it follows that he was rightly admitted, and his evidence was considered as out-weighting that of Dunn's, and in my opinion very properly. It is said, his (Nelson's) incompetency appeared afterwards, and therefore his testimony ought to have been rejected; but that incompetency can be shewn in no other way than by saying that Wallis denied the usury. If that is a denial of the usury, words have lost their meaning. If this is to satisfy the provisions of the statute against usury, it is a repeal of the statute. Now admitting that the statute is impolitic, which I by no means think is the case, I think it better to leave it to the legislature to act, than in this way to remove what has been for ages considered as a necessary shield against the practices of the fraudulent and against the destruction of the circulating medium of the country, and what in the language of the preamble to this act "the constant experience of all states and nations for ages past has deemed necessary."

But another objection is suggested, that it appears that Dunn was the real lender, and therefore his testimony will

WALLIS, vs. NELSON.

exclude Wallis. The amount of this is, that the court will direct a plaintiff to conduct his cause so as to shield himself against the operation of the statute. Dunn was not offered until Nelson was sworn, the plaintiff and his counsel certainly knew the case and were at liberty to conduct it as they thought best. If they did not choose to bring forward the lender, the court, under the provisions of the act, could not refuse the oath of the borrower. The court could not divine who the lender was. The natural presumption was that which occurs in all such cases, when the lender is not produced, that is, that he could not contradict what the borrower was willing to swear to. If the argument meant to say, that the court should have directed the jury to believe Dunn in preference to Nelson; I can only reply, that I have no doubt that such a recommendation would have been considered as an insult to them and dereliction of duty in the presiding judge. Lastly, this is an appeal to the discretion of the court; no rule of law has been violated, the plaintiff, as he had a right to do, was permitted to conduct his cause as he pleased, and if he has, by his own management, laid open to this court the illegality of his cause of action; is it the duty of the court to help him out of the difficulty? Is the aid of this court to be lent to assist usury? *Wilkes vs. Roosevelt*, 3 Johnson 206. I presume not. I at least, will prefer to say to them in the language of Lord Mansfield, in the case of *Hoyer & Edwards*, Cowper 114; that where the real truth is an usurious loan of money, the wit of man shall not find a shift to take it out of the statute.

JOHN STONEY, vs. JOHN P. McNEILL.

After pleading to the merits, it is too late to take advantage of the plaintiff's omission to make oath of the debt or sum demanded, at the time of filing his declaration, in a proceeding by attachment.

A person who is in possession of a bond, assigned in blank, is in law, prima facie, the owner; and the obligor making payment to such holder, bona fide, will be discharged.

Any evidence which went to shew that the payment was made bona fide, should have been admitted; without regard to the intention of the obligee, at the time of making the assignment.

One who had guarantied the ultimate payment of a bond, was held an incompetent witness to prove that it had not been paid to himself, while it was in his possession, assigned in blank.

THIS was an action of debt, by process of attachment, brought by the plaintiff, as assignee of Alexander Henry, against the defendant, one of three co-obligors. The plaintiff made no affidavit of the subsistence of the debt, upon filing his declaration, as the attachment act requires. On the suggestion of the plaintiff's attorneys, that the defendant had an attorney in fact, residing in Charleston, a rule was issued and served on him, requiring the defendant to plead within two months, or suffer judgment by default. In pursuance of this rule, the defendant pleaded, first: That there had been no assignment made of this bond by Alexander Henry, the obligee, to the plaintiff; and secondly, that an assignment had been made by Alexander Henry, the obligee, to Joshua Brown, to whom the defendant had satisfied his obligation, and was discharged. The bond in question was the joint and several obligation of William Walton, John Walton, and John P. McNeil, bearing date the 11th December, 1811. On the back of this bond, Alexander Henry the obligee, had endorsed his name, in blank, and annexed thereto his seal. The following special guarantee was also placed upon the back of the bond: "I, Joshua Brown, do hereby bind myself, my heirs, executors, and administrators, to guarantee to the within named Alexander Henry, his heirs, executors, and administrators, and assigns, the ultimate payment of the within bond, on which has been made no payment whatever, together with the interest to grow due thereon, according to the tenor and effect of the within bond. Given under my hand and seal, this the fourth day of June, 1812."

(Signed)

JOSHUA BROWN, (L. S.)

STONEY, vs. M'NEILL.

In this situation the bond had passed into the possession of Joshua Brown, by delivery, with whom it had remained for the space of two years, during which period, M'Neill, the defendant, in a settlement made with Brown, the holder of the bond, obtained from him the following receipt, which was endorsed upon the bond: "Received at Charleston, the 25th May, 1813; from Mr. John P. M'Neill, the sum of eight thousand five hundred and fifteen dollars, in consideration of which payment, I do hereby exonerate him from any further responsibility on account of the within bond."

(Signed)

JOSHUA BROWN.

Subsequently to these proceedings, to wit, in the year 1817, the blank above the name of A. Henry, on the back of the bond, was filled up in these words: "I assign and set over the within bond and all my right and interest therein, to John Stoney, his executors and administrators, for value received."

Mr. Joseph Bennett testified that the bond was brought to him by Mr. Stoney, to be sued for the benefit of all concerned. That the words over the name "A. Henry" were not then written, but that a receipt, signed by Joshua Brown, was then on the bond; that the assignment was filled up by the clerk in the office, when the declaration against Walton, one of the obligors, was drawn. This declaration had been filed in July 1817, and the present suit was commenced in March, 1817. The defendant gave in evidence, an answer of Mr. Stoney, in the court of equity, in which he avers the assignment to have been to him and three others, and that he had no exclusive interest in the bond, and that he received the bond from Joshua Brown, in 1814. On the adduction of this evidence, a non-suit was moved for, which was overruled.

Mr. John Robinson was called by the defendant, to prove that Joshua Brown and Alexander Henry, who had been partners in trade, had given public notice in the papers, upon the dissolution of their partnership, that all debts due to them were transferred to Joshua Brown, and to show that this bond was given for a partnership debt; but the admissibility of this evidence was overruled; as also evidence which was offered of an arbitration between Brown and Henry, respecting the property of this bond, and evidence to prove a contract

STONEY, *vs.* M'NEILL.

between Brown and Henry, respecting the assignment of this bond.

General John Geddes was called, by the defendant, and proved that he delivered this bond, with Henry's name on the back of it, to Joshua Brown, on the 4th June, 1812. He stated that it had been agreed, by arbitration, to assign the bond, as a collateral security, to Fitzsimons, Stoney, Williamson, and Cohen, and that it was part of the agreement that they should give a receipt; that Brown brought their receipt, and he (witness) delivered the bond to him; that the assignment was made in pursuance of an arbitration, and was left in blank for the parties to fill up as they pleased. A Mr. Burke proved, that the consideration of the discharge by Brown, was cotton and produce, delivered by M'Neill to him; and he stated that when M'Neill made this satisfaction, he and the Waltons had failed, and that all his estate would not have paid 5s. in the pound.

To rebut the force of the evidence offered by the defendant, the plaintiff called Joshua Brown; to whom the defendant objected on the ground of interest; but the presiding judge ruled that his interest and the defendant's were the same, and that being called by the plaintiff, he was competent to swear against his interest. Mr. Brown was first interrogated on his voir dire, and said he was not interested, because he was insolvent; and whatever the event of the suit might be, he could lose nothing. He was sworn in chief, and stated that the bond was delivered to him on the 4th June, 1812, to carry to the parties, who had given a receipt for it; but that neither Mr. Stoney, nor any of them would receive it, and he kept it two years: that M'Neill offered to pay him one-third for a discharge; that witness told him, he had no right to receive it, and that the bond did not belong to him; that he was a mere carrier; but M'Neill said he did not care, and gave him the draft of a receipt, and said that if he would put that receipt on the bond, he would pay him, in produce, one-third of the bond. He said M'Neill had cheated him, and that he had lost \$2,800 on the produce; but that he paid over the full amount towards satisfaction of Mr. Henry's notes.

The presiding judge stated to the jury, in the charge made to them, that the assignment to Stoney had been fully proved.

STONE, vs. McNEILL.

and that he was entitled in law to recover the full amount called for by the bond: that the jury could not and ought not to respect the plea of satisfaction to Brown, to whom the evidence showed no assignment had been made; that it was not the intention of Henry to assign to him, and, therefore, the assignment in blank operated no transfer to him, with other views taken of the subject, all tending to shew that the right of the plaintiff to recover was undoubted. The jury found a verdict, corresponding with the charge, to the amount of the bond. The defendant now moves to set aside the verdict, and that a non-suit be entered, for the following reasons:

1st. That the affidavit of debt was indispensable by the attachment act.

2d. That if the affidavit be not positively necessary in an attachment cause, it is at least essential that the contrary should not appear; but the answer which was put in as evidence, expressly negatived the assertion of debt due to the plaintiffs.

3d. Because if any assignment was proved, it was an assignment to four persons jointly, and not to one severally. In the event of this motion failing, then a new trial is moved for;

1st. Because the presiding judge excluded evidence material to prove a joint assignment.

2d. Because he rejected evidence, material to shew that A. Henry and John Stone had enabled Brown to hold himself out as the owner of the bond, with all the external indicia of property.

3d. Because he admitted the testimony of Mr. Brown, who was directly interested in the event of the suit, and was mistaken in supposing Brown was swearing against his interest.

The 4th and 5th grounds relate specifically to the charge of the judge, which has already been taken notice of.

Grinke, for motion. The affidavit in this case was certainly matter of substance, being positively directed by the attachment act. If on the trial of a cause, it appear that the plaintiff is an alien or a slave, he will fail, though the matter may not have been pleaded. Such an one is incapable to sue. The statute authorizes this process, on condition of making the affidavit; and if in the progress of the cause, it appear that the affidavit was not made, the defendant may avail himself of the defect.

As to the assignment of this bond to plaintiff; it is in

STONEY, vs. McNEILL.

evidence that the assignment in blank, on the back of the bond, was made with a view of transferring the property to four. The rule is that all who are legally interested on the subject matter of the action must join. How is it that Stoney has sued alone? He might perhaps have maintained trover for the bond, if it had got out of his possession; but this would have been founded on his possession alone, and has no relation to the present question. A blank indorsement may be filled up after action brought, but it must be according to the rights of the parties. Stoney it seems sues for the benefit of all concerned, but whence does he derive his authority to do so? Those who are interested in a contract or piece of property, may appoint an agent, whose acts will bind them, but this will not authorize him to sue in his own name. Or admitting that the assignees of this bond might, by mutual consent, fill it up in the name of either, is there any evidence of such consent? Could a judgment in favour of this plaintiff, be pleaded in bar to a suit by the four? Might a payment to the four be pleaded, so as to defeat the action of the present plaintiff? A question may well be made too, whether the whole of the assignees had a right to sue, as the bond was only transferred to them in pledge.

Petigru, att'y. gen. for motion. The evidence establishes, that the bond was placed in the possession of Brown, by Henry; that the plaintiff and those interested with him, refused to receive it of Brown, and permitted it to remain in his possession for two years, and that while in the possession of Brown, the payment was made by McNeill, and the discharge given, which appears on the back of the bond. With respect to this part of the case, our proposition is, that if one person furnishes another with the means of exhibiting himself as the owner of his property, he will be bound by his acts, so far as third persons without notice, are concerned. This is the hinge on which the case turns, and will be examined particularly.

An example may be given in the case of sales made by a factor: "When a factor deals for a principal who does not appear, and the factor delivers the goods in his own name, if the person dealing with the factor on his own account, has any demand against the factor, he has a right to consider the factor as the principal, and to set off any demand he may have against

STONE, vs. McNEILL.

the value of the goods so sold, and such would be a good answer to any action by the principal for the price of the goods." *George vs. Claggett*, 2 *Espin. Rep.* 557. So in *Delira vs. Edwards*, "where a factor, by assent of his principal exhibits himself as owner, and by that means obtains credit, the principal will be liable who furnished the means. 1 *Maule & S.* 147. The case of a factor pledging, is treated as an exception from the general rule; yet wherever a person furnishes another with the means to exhibit himself as owner, he shall be responsible. See *Rabone vs. Williams*, 7 *T. R.* 356. -

The transfer of a bill of lading, by a general assignment, is a case in point. In *Wright vs. Campbell*, 4 *Bur.* 2046, the owner had assigned the bill in blank and sent it to his factor, for the purpose of receiving the goods for him. The factor disposed the bill of lading for his own use, in payment of his debts; the owner seized the goods. Per. *Ld. Mansfield* "if there be an authority never so general by indorsement on a bill of lading, without disclosing that the endorsee is a factor, the owner as between him and the factor, retains a lien 'till the delivery of the goods and before they are actually sold and converted into money. If the factor pay it over to a third person, with notice, it may be followed in the hands of such third person, for in such case, it remains in his hands just as it did in the hands of the factor himself. But if they are *bona fide* sold by the factor, the vendee shall hold them by virtue of the bill of sale. If so, then the whole of this case turns on the question whether this was a fair transaction, without notice, or a trick and contrivance to cheat the owner." In *Solomons vs. Nissen*, 2 *T. R.* 678, it is again laid down, that in all those cases, between the real owner and third persons, the question is *bona fides*. But this is a question which was not submitted to the jury in the present case. His honor the presiding judge, instructed them that Brown had no right to receive the money, because the blank assignment was not made with a view of transferring the property of the bond to him, and that McNeil could not be protected in his payment, whether made *bona fide* or no. Had it been otherwise, we are very strongly persuaded, that, notwithstanding the testimony of Mr. Brown, the jury, upon all the circumstances

STONEY, vs. McNEILL.

of the case, would have decided for the fairness of the transaction on the part of the defendant.

The rule itself is founded upon a general principle, that "where one of two innocent persons must suffer, by the act of a third, he who has enabled such third person to occasion the loss, must sustain it. *Per. Ashhurst, J. in Lickbarrow vs. Mason, 2 T. R. 63.*

But did Mr. Stoney and Mr. Henry, furnish Brown with the means of exhibiting himself as the owner of this bond? They permitted it to go into his possession and remain there, with an assignment in blank indorsed. What is the effect of a general or blank assignment? and in what does it differ from a special assignment? As between the parties themselves, the actual owner still retains his right, in whatever terms the assignment may be drawn. But as to third person, the question is bona fide or not. It is a general rule that there is no difference between a general and a blank assignment. In the celebrated case of *Lickbarrow vs. Mason*, this distinction would have been very material, but was abandoned. *Per. Buller, J.* "Lord Hardwick thought there was a distinction between bills of lading indorsed in blank and those indorsed to particular persons, but it was properly admitted at the bar that the distinction could not be supported." 2 T. R. 73. If we may rely on this authority, our case is as strong as it would have been, had Henry written above his signature, "I assign to Joshua Brown."

In this very case, his honour laid down, that *Stoney* might lawfully fill up the blank assignment. And why is this lawful? because the assignment in blank is equal to an assignment to a particular person. So as to bills of lading: after establishing the principle, that bills of lading may be transferred by indorsement of the owners name, it was held, and so the jury found, on the second trial of the case of *Lickbarrow vs. Mason*, "that indorsements in blank, that is to say, by the shipper or shippers, with their names only, may be filled up by the person or persons to whom they are so delivered. 5 T. R. 683. On no other ground can the right of the holder to fill up the assignment be sustained. It is one of the incidents of an assignment in blank, that it gives to the person to whom it is delivered, the right of filling it up; and it gives him that right, because it is a

STONEY, *vs.* M'NEILL.

transfer of the property of itself. If it did not of itself transfer the property, the alteration made by filling up the blank would be forgery. The strictness of the common law, with respect to altering deeds is well known. *Pigott's case*, 11 co. 27. The rule is the same as to other writings. *Mastyn vs. Miller*, 2 Hy. Bl. 141. *Bulkley vs. Howell*, 1 Nott & M'Cord, 249, was the case of an assignment in blank.

But it will be said *Brown* acquired no right to fill up the blank; which is as much as to say, Brown did not acquire the real ownership by the assignment in blank. Neither would he have done so by a special assignment in his name, if it had been made for the use of Henry or any other person. Let it be admitted, however, that he was only the apparent owner. The general rule applies to the case "that if one of two innocent persons must suffer, he shall bear the loss who enabled a third person to occasion it.

But it may be objected that there was in fact no assignment to Brown. Though Stoney may be bound by his acts, in consequence of permitting him to exercise an apparent ownership; yet he himself still remained the real owner. In order to avail ourselves of the satisfaction made by Mr. M'Neill, we should have pleaded payment generally or satisfaction to the plaintiff, and that our plea of assignment to Brown, cannot be supported. In pleading, it is sufficient to alledge things according to their legal effect. If M'Neill, without notice, paid to Brown as assignee, it supports the plea, because *virtually* he was assignee.

Yet how can it be concluded that there was no assignment to Brown, when our evidence was stopped. The bond was his property, and certainly it is *possible* that we might have shewn it. The court, not knowing the circumstances, look upon him as a joint obligor. The rejection of the evidence is supported by the decision in this case, when formerly before the court. 1 M'Cord, 85. The case only decides that payment to a partner, who does not appear in the bond, cannot be pleaded. It does not follow that partnership may not be an important fact in the proof that the payment was bona fide—or in proof of an assignment, if all partnership debts be assigned. But the judgment is in our favor, as it lays down expressly that every thing

STONE, vs. McNEILL.

which could be proved under that plea, might be given in evidence under the general issue.

Prioleau, against the motion. I shall first inquire as to the necessity of the affidavit, which was omitted to be filed with the declaration; next, examine the sufficiency of the proofs, as applicable to the issues in the case, and last, the competency of Brown's testimony:

First, as to the affidavit. The attachment act requires that an affidavit shall be made, upon filing the declaration; it is not required that it shall be filed, or shall be in writing. The presumption is that an officer, intrusted with a public duty, has discharged it; and if the affidavit were necessary, we ought to presume that the clerk of the court did not file the declaration until it was made. But is it necessary, now, that the affidavit should have been made? The party defendant has appeared, and pleaded to the declaration, which he alleges to have been thus irregularly filed. (Here Mr. Prioleau was stopped by the court, who were satisfied as to this point.)

The questions presented by the issues are, did Henry assign to Stoney? did he assign to Brown? The assignment on the back of the bond, produced in court, was regular and perfect, and furnished complete evidence of the assignment to Stoney. Parol testimony should not have been received to contradict this evidence. It is true, that parol testimony may be given, to shew for whom a blank endorsement was intended: but when the blank is filled up, according to the intention of the parties, it is regarded in law as though it had been written in full, from the beginning; and can be no more explained, contradicted, or altered, by parol testimony, than any other written instrument. For whom the assignment was intended, is a matter of fact, which was submitted to the jury; and they have found an assignment to Stoney, and no assignment to Brown.

Admitting all the force of the argument, that he who enables another to hold himself out, as the owner of his property, will be bound by his acts, it cannot avail the defendant, under his pleas, in the present case. Brown was not assignee. It is clearly proved that the bond was delivered to him as an agent. His guaranty, written on the bond, rebuts any presumption of his having an interest in it; for why guaranty the payment of a

STONEY, vs. M'NEILL.

debt due to himself? If he had any interest, previous to the transfer to Stoney, he could not now assert it; for he was privy to that transfer, and sanctioned it by his acquiescence. Any thing which passed between Henry and Brown, is, as to the present plaintiff, *res inter alios acta*. If it was the defendant's object to shew that the plaintiffs acts, or his negligence, gave Brown authority to receive payment, he should have pleaded payment generally. Payment to an agent would have sustained that plea, but cannot sustain those which are pleaded.

The guaranty of Brown must have had the effect of putting the defendant on his guard. He could scarcely suppose him the owner of a bond, for the payment of which he had bound himself to a third person: and he who pays money must see to the application of it, and be certain that he pays to his creditor.

Was Brown a competent witness? To render a witness incompetent, his interest must be direct; he must gain or lose by the event of the suit. A witness may be sworn against his interest; or if he is equally liable to both parties, he is competent. (1 *M. Cord*, 285; 1 *T. R.* 164; 1 *Espin. Rep.* 120; *Phil. Ev.* 56.) Brown swore against his interest. If he had proved the bond lawfully paid, his guaranty would have been discharged: by proving it unpaid, his liability, in the event of M'Neill's inability to pay, continued; and he moreover rendered himself answerable to M'Neill for the amount which he had received of him.

Hunt, against the motion. This seems to be a case depending on facts; and the facts were fairly submitted to the jury. The question was, to whom was the bond assigned. The assignment was made in blank, and all testimony was admitted, which went to shew for whom it was intended.

What effect could the testimony, which was rejected, have had on this question. It was attempted to be shewn that this bond, in the name of Henry, was the property of Brown—or was partnership property. Even if this were the fact, and it were competent to shew it by parol, Brown, who is said to have owned the bond at the time the payment was made, would be estopped from setting up the claim. The testimony of Gen. Geddes shews that the guaranty of Brown, and the assignment to Stoney, were contemporaneous; they were part of the same

STONEY, vs. McNEILL.

transaction. Brown then in effect, guarantied the payment to Stoney; and how can it be pretended that he was the owner, as against Stoney?

But it is said that Stoney, by permitting the bond, with blank assignment, to remain in the hands of Brown, enabled him to hold himself out as the owner, and is answerable for his acts. It does not appear, however, that Stoney knew the assignment to have been in blank. He knew that it had been agreed that the bond should be assigned to him: he was informed that it was assigned, and delivered to his agent; and naturally supposed that the obligor would take care to see the assignment and ascertain the holder's right to receive, before he made payment.

Harper, in reply. 1st. As to the affidavit, which is required by the attachment act, and which was omitted to be filed with the declaration. It is said that this provision of the act was intended for the benefit of the defendant, and has been waived by pleading to the merits. The distinction is, that an *irregularity* may be waived, by the opposite party's failing to take advantage of it at the earliest opportunity, or proceeding after it has been committed; a *defect* cannot be so cured. *Tidd*. 435. Is this a defect? Under a statutory proceeding, the omission of any thing which the statute positively enjoins, is a defect. The stat. 27, Geo. 3, c. 1, gives an action of debt, to recover certain penalties under the lottery act, and directs process to issue "specifying therein the amount of the penalty or penalties sued for; whereof an affidavit shall first be made and filed." In the case of *King, Q. T. vs. Horne*, 4 T. R. 349, it was contended that the legislature had given the common law action of debt, and that if any irregularity had been committed, by failing to make and file the affidavit, it had been waived by taking out the declaration, but the court said, "the act of parliament is imperative." Our statute is nearly in the same words. See also *Goodwyn, Q. T. vs. Parry*, 4 T. R. 577.

We are to enquire, under our issues, whether there has been an assignment of this bond to the plaintiff, so as to enable him to sue; and next, whether there was an assignment to Brown, to whom we have pleaded satisfaction.

STONE, vs. McNEILL.

It may aid these inquiries, if we can ascertain in what manner the assignment of a bond is to be made. By the common law, any property in possession might be transferred, or *assigned*: choses in action, in general, could not; but there was an exception, with respect to a particular sort of choses in action, by the law merchant. Our statute, which authorises the assignment of bonds, prescribes mode of effecting it; and it is for the court to determine whether they are to be transferred like any other personal property; or whether their transfer is to be governed by the rules which apply to *negotiable paper*; the only assignable choses in action heretofore known to our law. It is perhaps not very material to our case, how this may be settled; but our defence will stand in a different point of view, as we regard the assignment to have been made in one or other of these modes.

Things in possession may be assigned by deed, or by writing without seal, or by words expressing the intention, accompanied by delivery.

As this assignment now appears on the bond, it seems to have been made by deed. But the testimony informs us of circumstances, which will prevent its operating as a deed. A blank signature and seal were first put on the back of the bond and the body of the instrument afterwards written above it. The slightest alteration of a deed will vitiate it. 11 Co. 27. *French vs. Walton*, 9 East, 351. *Powell vs. Duff*, 3 Camp. 181. A blank signature with a seal was decided to be no bond under our attachment law. *Boyd vs. Boyd*, 2 Nott & Mc Cord, 126. Judge Gantt, in that case quotes from 4 Com. Dig. Tit. *Oblig. B. 3*. "If a blank be signed and sealed and afterwards written, it is no deed."

The same doctrine is equally true of any other writing, apart from the law merchant. A blank signature delivered and afterwards filled up as a bill of sale for a horse or a slave, would be as much a nullity as a seal, delivered to be filled up as a bond. There is no such thing known to our law as the filling up of blank contracts, except under the custom of merchants.

This bond then was not transferred by deed or written assignment, was it transferred by delivery? The plaintiff is in possession, but he has not shewn how he came by it. It is said

STONE, vs. McNEILL.

to have been delivered to Brown, as his agent. We might, if it were necessary, fairly contest the fact of Brown's agency, for the plaintiff swears that he refused to receive the bond from Brown and disavowed him as his agent. But waiving this objection, if Brown was the agent of the plaintiff, he was also the agent of three others. The title of the bond was vested in four, if it was transferred like other personal property, and all the owners ought to have joined in the suit. 1 Chit. Pl. 7.

The only ground on which the plaintiff can sustain this suit is, that being in possession of the bond, with an assignment in blank, he had a right to fill it up in his own name; that is, that its transfer is to be governed by the custom of merchants.

We might argue against this position, that the instrument is a specialty; and that to alter or release, and by parity of reason, to assign a specialty, an instrument of as solemn a nature is required. The authority to make a deed must be by deed. This court however has departed from the rigour of the ancient principle, and in the case of *Howell ads. Bulkley*, 1 Nott & M'Cord, 240, it was decided that a bond might be assigned by writing without seal. It is necessary however, to qualify a conclusion which is drawn in that case. The case of *Noke vs. Awdler*, Cro. Eliz. 373, 436, is cited, for the purpose of shewing that a covenant might be assigned by parol. The case only decides that where a term was created by deed, which contained covenants running with the estate, as the term might be assigned without deed, the covenants should follow by operation of law. It is rather opposed to the inference which was drawn from it.

Admitting however, that the assignment may be made by a signature in blank, it does not follow that it may be made by a signature and seal. When it is filled up, it becomes a deed, if any thing; and we have shewn that a deed cannot be so made. Negotiable paper may be assigned by a blank indorsement; but I apprehend not by a blank indorsement, with a seal annexed. If a signature be delivered, for the purpose of having a note for the payment of money, written above, it will be good when filled up. Not so, if it be under seal. The assignor attempted to transfer by deed, and it must operate as a deed or not at all.

STONEV, vs. McNEILL.

Conceding however, what the plaintiff contends for; that being in possession, he had a right to fill up the blank, and that we must resort to the law merchant, for the rules which are to govern the transaction; let us see how our defence will stand in that view of the case. Perhaps this is the correct view, where a bond has been transferred by blank indorsement. So the case of Howell and Bulkley seems to regard it, and it accords with what we know of the intention of the legislature. It is well known, that long previous to the passing of our statute, there was a custom, in this state, of transferring bonds as negotiable paper. In reference to this established practice, the act was passed.

By the law merchant, a note or bill, indorsed in blank, may be afterwards transferred by mere delivery, and any one into whose hands it may come, may fill up the blank in his own name. On this and nothing else, rests the plaintiff's right to sustain this suit. But had not Brown the same right to fill up the blank and bring a suit, or receive payment, when the bond was in his possession? Our case is surely not different from what it would have been if Brown had actually filled up the blank, previous to receiving payment. It was contended that he had not such right, and so the jury were instructed on the trial, because the blank assignment was not made with the intention of transferring the bond to him. Without insisting on the answer, that neither was there any intention of transferring to the plaintiff alone; we say that such intention was not necessary. *The rule is, that he who is in possession of a negotiable paper, with a blank indorsement, is, prima facie, the owner. If he came into possession, bona fide, and for valuable consideration, he is owner against all the world: though not bona fide, nor for valuable consideration, yet he shall be considered the owner, as to all who deal with him bona fide: those who make payment or take a transfer of the paper from him, in good faith and for valuable consideration, will be protected against all the world.* If the holder of a note or bill, indorsed in blank, or transferrable by delivery, lose it or be robbed of it, and it come into the hands of a bona fide holder, for valuable consideration, he may maintain an action on it; or if payment be made to one who stole or found it, the person making pay-

STONE, vs. McNEILL.

ment will be discharged. *Chit. Bills*, 190. See *Putnam vs. Sullivan*, 4 *Mass. Rep.* 45.

This is established for the protection of commerce, and on the principle which has been brought so fully to the view of the court, "that if one of two innocent persons must suffer, he shall bear the loss, who enabled a third person to occasion it."

In our case however, the bond was not stolen nor found by the holder, but was put into his possession and suffered to remain there for two years, by the person who claims to be the owner. It is difficult not to infer an intention that Brown should have authority to receive payment or make a settlement of the bond. If such intention did not exist, no conduct could be better calculated to enable Brown to commit a fraud. Even in England, it has been held that one making payment in good faith, to the holder of a bond or note not negotiable, should be protected. 1 *Bos. & Pul. N. R.* 103. *Eq. Ca. Ab.* 144, 5.

But if the plaintiff is owner of the bond now, it can scarcely be thought that either he alone, or together with the other three persons for whose benefit the assignment was made, was owner at the time of this payment. The bond was assigned as a collateral security and delivered to Brown, as the agent of the assignees, who refused to receive it of him. This refusal can only be interpreted into a determination of his agency and a relinquishment of their security. During the two years that it was in Brown's possession, none of them could have received payment. But was no other person authorized to receive payment? was the bond struck out of legal existence and in abeyance all that time?

The answer perhaps will be, that Henry, in whom the legal title of the bond was, previous to the attempt to assign, was the proper person to receive. If so, it will be decisive of the admissibility of part of the testimony which was offered on our part and rejected. Evidence was offered of an agreement and an arbitration, between Henry and Brown, on the subject of the property of this bond; as also that Brown and Henry had been partners, that this bond was given for a partnership debt, and that upon the dissolution, Henry had advertised in the newspapers that Brown was authorized to receive all partnership debts. The evidence was rejected on the ground, as I un-

STONEY, vs. M'NEILL.

derstand it, that Brown, having sanctioned the assignment to Stoney and the rest, should not be permitted to set up a title against them. But if their title at that time, is out of the question, we may certainly shew that he had a title as against Henry. The agreement may have been to assign; the award may of itself have operated an assignment.

With respect to the competency of shewing by parol, that the bond was given for a partnership debt; we may produce numerous authorities to shew that courts of law will look into the equitable interests of parties, whose names do not appear on the bond; some of the cases having the closet analogy to the present. *Legh, vs. Legh*, 1 *Bos. & Pul.* 446; *Winch, vs. Keely*, 1 *T. R.* 619, *Bottomly, vs. Broo'e*, (cited in the last case.) 1 *Johns. Rep.* 531; 3 *Johns. Rep.* 425. At all events, that circumstance, together with the advertisement by Henry, would have been the most material evidence that could be given, to shew the *good faith* of M'Neill, and that he had cause to believe Brown authorized to receive payment. It would be entirely conclusive but for

Brown's testimony. The argument in favor of his competency, and that he was indifferent in interest between the parties, seems to suppose that he guarantied nothing but the solvency of M'Neill. But this is not so; he guarantied the ultimate payment of the bond; which includes two things; that there was a good right of action on the bond, and that M'Neil would be solvent. If the bond had been forged, the guaranty would still have been binding. He warranted against the obligor's having any defence at that time, and against any defence which might afterwards arise, by the act of him, (Brown.) If M'Neill can defend the action, on the ground of payment to Brown, the verdict will be conclusive evidence against Brown, in an action on his guaranty, for the whole amount of the bond. If M'Neill should fail, he can, at most, recover but the money which he actually paid; or, if Brown tells the truth, that they were *participes fraudis*, nothing at all.

Brown himself seems to have been conscious of this, for he puts his disinterestedness on the ground of insolvency. This is a new source of competency; but before it can avail the witness, the court must determine that he will always continue insolvent.

STONE, vs. McNEILL.

The opinion of the Court was delivered by Mr. Justice Gantt.

The first ground taken for a nonsuit is, that the plaintiff failed, when called on, to produce the affidavit or the oath required by law, of the debt due. By the fifth section of the act of assembly, passed in 1744, the plaintiff is required, on filing his declaration, to make oath to the debt or sum demanded. In this case, it appears that on the suggestion of the attorneys of the plaintiff, that the defendant had an attorney in fact, residing in Charleston; an order was obtained that a rule should issue, directing him to plead within two months from the date hereof, or that judgment by default should go. Under this order, the pleadings were regularly made up, and the parties were at issue on the merits.

By a clause of the act of 1785, all attachments shall be repleviable by appearance, and putting in special bail, if by the court ruled so to do. (*Public Laws* 368.) Here then was an appearance on the part of the defendant, and he pleaded to issue. No special bail was required or ruled by the court. After these proceedings, the court think that it was too late for the defendant to take advantage of such an omission; pleading to issue amounted to a waiver of such exception. The exception might have been taken advantage of by motion to dissolve the attachment, had the plaintiff in fact failed to comply with what the law required of him; which is not to be presumed under all the circumstances of the case. This motion must, therefore, fail.

On the last ground taken for a non-suit, it is certain that the assignment as filled up, seems to be at variance with the proof offered, as to the right intended to be transferred. The testimony of Gen. Geddes is express, that the bond was to be assigned as a collateral security to Fitzsimons, Stoney, Williamson and Cohen; and the answer of Mr. Stoney, in equity (before alluded to) is equally express, that it was not to be for his exclusive benefit. But although others, besides Mr. Stoney, were interested in this bond, which was to be lodged as a collateral security, for their joint benefit; still from the testimony of General Geddes, it appears that the assignment was left in blank, for the parties to fill up as they pleased. There can be no doubt that an action upon a contract, either express or

STONEY, vs. M'NEILL.

implied, by parol or under seal, must be brought in the name of the party in whom the legal interest is vested; and that in all cases, if it appear on the face of the pleadings, that there are other obligees, covenantees or parties to the contract, who ought to be, but are not joined in the action, it is fatal on demurrer or on motion in arrest of judgment; and though the objection may not appear on the face of the pleadings, the defendant may avail himself of it, either by plea in abatement, or as a ground of non-suit on the trial, upon the plea of general issue, 1st Chitty on Pleading, 3. 7. Notwithstanding such is the law, still the court think that as to such an endorsement as was made upon this bond, it is competent in the holder to fill it up as he pleases.

On the ground taken for a new trial, I shall briefly comment: first, upon the admissibility of Joshua Brown, as a witness, and conclude by referring to the nature of this assignment, and what took place under it.

Mr. Brown was certainly an interested witness, and such as ought to have been excluded. He had guarantied the payment of this bond to Henry, and his assigns; consequently in the event of its not being recovered from M'Neill, he, Brown, would on his guarantee, have been liable to the assignee of Henry, for the amount of the bond. By fixing, therefore, a responsibility upon M'Neill, he would at the same time free himself from the liability produced by his special guarantee. It is not denied but that this circumstance, if it stood alone, would have rendered him incompetent; but it is urged that he is also liable to the same extent to M'Neill, on the receipt and discharge given to him on the bond, and that this equal liability to the parties litigant, went to remove the objection of interest and rendered him competent. But if what he has stated be a fact, it may well be questioned whether Brown would be liable in any manner to M'Neill, who would in such case have made himself particeps criminis; and in no event could he be liable to M'Neill, for more than he received. So that it follows very clearly that Brown was altogether interested in Stoney's recovery; and, therefore, was in law an incompetent witness.

As to the assignment made by Henry, in blank, accompanied with the solemnity of a seal and delivery of possession

STONEY, vs. M'NEILL.

As Brown, of the bond, no other correct inference can be drawn from it, but that he, Brown, ipso facto, became in legal contemplation the assignee and owner of the bond, and that an obligor making payment, without fraud, to such holder and ostensible assignee, is and ought to be protected against the real owner, whoever he may be. The circumstance of the special guarantee upon the back of the bond by Brown, would, in conjunction with the possession of the bond in him, strengthen the presumption of his ownership. What other fair inference could be drawn, but that in consequence of his liability, he had taken up the bond and made it his own; and when we add thereto, the circumstance of the assignment in blank under seal, no possible doubt could remain on the mind of any man, but that Brown was not only the ostensible but the real and bona fide owner of the bond, and might do with it as he pleased. It is certain that M'Neill, the obligor, had no hand in placing the bond in the possession of Brown, nor had he any in its remaining with him for so long a space of time as two years. No person, therefore, concerned in interest, can with any color of propriety complain, if under circumstances so well calculated to deceive, a debtor has, when called on for payment, discharged his obligation to such holder and ostensible owner.

The filling up the blank in the name of Mr. Stoney, at a period long subsequent to the settlement made with Brown, can in no manner do away the legal effect and operation of the payment which was made; a payment and discharge entered at the time on the bond, and which, if performed with good faith, cannot be called in question.

I will only add one further remark in respect to the rejection of Mr. Robinson's testimony. This evidence ought, in my opinion, to have been received. If it could have proved that this bond was the copartnership property of Henry and Brown; that public notice in the papers had been given, that all debts due to them were transferred to Joshua Brown; these facts, conjoined with the endorsement in blank by Henry, and possession of the bond by Brown, would certainly have established as strong a case to support the settlement made by M'Neill, as could possibly be presented to the view of a court and jury. Independently, however, of this view, the endorsement in blank by

STONEV, vs. M'NEILL.

Henry, and possession of the bond by Brown, were sufficient in law to authorise Brown, as ostensible owner, to adjust and settle with the obligor, M'Neill; as he might think proper. The court are, therefore, of opinion that a new trial should be granted:

Johnson, justice, concurred.

Nott, justice—I concur in the opinion which has been delivered by my brother Gantt in this case, for the following reasons. The affidavit which the plaintiff is required to make at the time of filing his declaration, is not the foundation of his action. It is only intended for the benefit and security of the defendant. He may renounce it, therefore, if he pleases, and did so by pleading to the action.

I do not think that the blank endorsement operated as an actual transfer of the bond; but it gave an authority to the holder, to fill it up as an assignment to whomsoever he pleased. The assignment to Stoney, therefore, was well enough, and although there may have been other persons interested in it, it did not lie in the mouth of the defendant to take advantage of it. Every holder, while it remained blank, was *prima facie* the owner, and had had a right to receive the money and give a discharge. The defendant, therefore, had a right to consider Brown the owner, as long as he had the possession of the bond with a blank endorsement upon it. Whether it became a deed or not upon being filled up, is not at all material. It certainly was not before, and in any view the effect would be precisely the same, as long as it remained blank; and parol evidence might be offered to show when the assignment was filled up, in the same manner as it may be received, to shew when a deed was delivered, contrary to the face of the instrument itself.

Evidence to rebut the ownership arising from the possession of the bond, might be, and actually was received in this case; but evidence in reply ought also to have been admitted, to show that Brown had an interest in it and how that interest arose; and that evidence, therefore, was improperly rejected. For, although a bond is not a negotiable paper, yet an assignment transfers an equitable interest, and the interest of the assignee will be respected in a court of law. I am, therefore, of opinion, that a new trial ought to be granted on that ground.

STONEY, vs. McNEILL.

I am also of opinion, that Brown was improperly admitted as a witness. He had a direct and manifest interest in the event of the cause. He had guaranteed the payment of the bond: He was, therefore, ultimately responsible, in case the plaintiff should fail to recover it of McNeill; and establishing McNeill's liability, had a direct tendency to exonerate himself. A judgment in favor of McNeill would have been conclusive evidence against him, and a judgment against McNeill, with a satisfaction upon it, would be equally conclusive in his favor. I think, therefore, that he was an incompetent witness, and that a new trial ought to be granted.

Huger, Justice concurred.

Bay, Justice.—In this case, I differ in opinion from the one just delivered, as I am strongly impressed with the idea, that substantial justice has been done by the jury, in the verdict they have found. This was an action by an assignee of a bond against one of the co-obligors, and the jury have found for the plaintiff on the assignment, and the question now is, shall this verdict be set aside, and a new trial granted or not? And in my opinion there are no legal grounds to support this motion, and all the confusion and lengthy arguments which have taken place on the occasion, have been owing to an attempt on the part of the defendant to introduce extraneous matter into this transaction, which has nothing to do with it, and to suppress testimony which was clearly admissible by the rules of evidence; as I trust will clearly appear by a brief examination of the case.

The bond in question, was given to Alexander Henry, by the defendant and William and John Walton, for \$25,000, on which there is a regular assignment in the following words. "I assign over the within bond and all my right and interest therein to John Stoney his executors and administrators, for value received."

(Signed)

A. HENRY.

From this it is unquestionably evident, there was a regular transfer of this obligation and the money mentioned in the condition of it, to Mr. Stoney, the assignee, which to all appearance is as fair and as simple a transaction as well could come before a court of Justice.

STONE, vs. McNEILL.

But it was said at the trial, that this was a partnership business, and that the bond was given on the account of a former copartnership which had subsisted between Alexander Henry and Joshua Brown, and testimony was offered to be given, to shew that it was given on this former copartnership account, and consequently that Joshua Brown had a power over it and was authorized to receive the amount, so as to defeat Mr. Stoney of his plain and obvious right of recovery under and by virtue of the assignment. Here then was a manifest attempt to alter and vary this bond, a specialty under seal given to Alexander Henry in his own private right, by shewing that it was given for a copartnership concern for the use of Brown and Henry. This was surely an attempt to alter and change the nature of a deed in a most material part of it, for it went to take away a plain and obvious right from the obligee of the bond and his assignee, and give it to another who was a stranger to the transaction, contrary to one of the plainest and best established rules of evidence in our whole legal system; viz: that parol testimony ought never to be admitted, to alter or vary or to contradict the face of a deed or other instrument under seal. Lord Mansfield has laid it down in the broadest and most unqualified terms, that there never was heard a case in which parol testimony or evidence was admitted to annul or vary substantially a specialty, *Loft. 459*. This doctrine is not only laid down by Lord Mansfield and the whole court in *Loft*, but the same principles are held by all the elementary writers on the law of evidence upon the subject, and this is the best answer I can give to all the cases quoted and relied upon by the counsel, on this part of the case; and particularly by one of the gentlemen, who conceded that one could not *plead* that a bond was given to a copartnership when it does not appear upon the face of it to have been given for that purpose, but there was nothing to prevent evidence being given of it. I am, therefore, of opinion, that this doctrine of offering parol testimony to do away the force and efficacy of a specialty or deed under seal, executed and made under the usual solemnities, is utterly inconsistent with all the rules of evidence with respect to specialties, and that the judge of the circuit court acted correctly and legally in rejecting it and all the

178 SOUTH-CAROLINA STATE REPORTS,

STONE, vs. McNEILL.

collateral consequences which went to impugn the face of the bond itself.

2d. The next important inquiry in the case, is, whether this assignment on the back of this bond to Stoney, was good and valid or not; and against its validity it was said, that it was originally a blank endorsement and transferred no right, or if it did, that the right was assigned to John Stoney and three others, and not to John Stoney alone; consequently that he could support no action upon the assignment under the late act of assembly. Upon this point, all the old and antiquated authorities of the common law, have been quoted, without any reference to the situation and convenience of this country, and they have been arrayed against the beneficial usages of S. Carolina, for nearly half a century past, to facilitate the interchanges of choses in action, among the citizens of this country, in their various transactions with each other. In the case of Parker and Kennedy, so long ago as the year 1794, it was stated and admitted that bonds, to the amount of several hundreds or thousands of pounds sterling, had passed away from man to man in the various transactions with each other since the revolution by blank endorsements on the back of them. That in sales and purchases, they had served the uses of the country as a kind of circulating medium, which relieved the distresses of the citizens exceedingly, at a period when the cash had been drained out of the state or exported to foreign countries, and that in these transfers the usual and common method of passing them was by a blank endorsement on the back of the bond; 1 Bay, 399; and chief justice Rutledge, in his opinion, delivered on that occasion, observed, that the intent and design of such blank endorsement was to enable the holder to fill up the assignment and to sue for and recover the money to his own use; and of the same opinion were the whole court; although two of the judges went further, and considered this blank assignment like an endorsement on a bill of exchange, and made the endorser liable upon the failure of the obligor; but in the authority of the holder to fill up this blank endorsement in his own name, and to sue and recover the money to his own use, the judges all agreed. In all these cases, however, as bonds were not payable to order, the holder was obliged to sue in the name of the obligee, which was often attended with serious

STONE, vs. McNEILL.

inconveniences. To remedy all which inconveniences, the act of 1798, was passed four years afterwards, authorizing assignees of bonds to sue and recover in their own names; and the preamble of this act recites, "that whereas many inconveniences have been experienced from assignees of bonds, notes or bills, not payable to order, or not negotiable, being compelled to bring suits for the recovery of monies due thereon in the names of the obligees of said bonds, or payees of said notes or bills." For remedy, it is declared that the assignees of bonds and notes may bring suit in their own names &c. &c. The decision of the above case, and the opinion of the judges upon this point in 1794, and the recognition of the same principles in the preamble of the act of 1798, added to the universal custom in South Carolina, and the general convenience of the inhabitants thereof, are sufficient in my mind to form a part of the common law of South Carolina, upon the subject at this day, and to render obsolete and inapplicable, all the old doctrine of the English law to the contrary notwithstanding. Highly as I value the old common law, and have always estimated it, I am not such a slave to its principles as to consider it like the laws of the Medes and Persians, unalterable. Times and circumstances alter the situation of the world, and the condition and conveniences of mankind render alterations necessary, and accordingly improvements have been made in the common law in England, from the time of Lord Coke, down to the present day; and surely the independent states of this union, have as good a right to amend and improve their common law systems as the people of England have. To conclude upon this assignment or endorsement, as presented to the court, after it was filled up, there was no averring to the contrary, the court was bound by it and could not travel out of it, and it would have been exceedingly improper to have suffered any parol testimony to have contradicted the assignment, as already mentioned in regard to the face of the bond. But admitting for argument sake, that it was intended for the joint benefit of John Stone, Williamson, Cohen and Fitzsimons, was there any thing improper or illegal in the consent of the three latter, that the bond should, in order to simplify the transaction, be assigned to John Stone, for their joint benefit? Surely not. That, however,

STONE, vs. McNEILL.

was a matter for their consideration, not for the court, when the blank was filled up in his name. The court could not go into the investigation of that matter, in a trial at law, between the assignee and a co-obligor of the bond.

3d. The guarantee of Brown upon the bond. By what authority Joshua Brown made this guarantee, or under what obligation he was to make it, I am at a loss at this moment to conjecture, after all that has been said about it. He was certainly no party in the transaction here, between the co-obligors and Alexander Henry; he was, from aught that appears upon the face of the bond, an utter stranger to it; I am, therefore, constrained to consider it as a voluntary and unnecessary undertaking on his part.

Then as to the receipt on the back of this bond, by Brown to McNeill for the \$8514, the one-third of the principal of the bond, and the release to McNeill from his responsibility: By what authority, I would ask, did Brown receive this money and give this discharge; which, if lawful, was a release in law to the whole of the co-obligors? The authority did not come from Alexander Henry, the obligee of the bond; for he has transferred to Stoney, and it was not pretended that John Stoney ever gave him any such authority to receive a cent of it. If then he was neither authorised by Henry, the obligee, nor by Stoney, the assignee, it was an unauthorised transaction between Brown and McNeill, a collusion between them to deprive the plaintiff, Stoney, from his recovery, or to throw funds unwarrantably into the hands of Brown, at the expense of Stoney; and what proves this collusion to my mind, is, in the first place, the evidence of General Geddes, who swore that when he delivered this bond to Brown, as the agent of Mr. Henry, it was delivered in trust, and for the purpose of carrying to Mr. Stoney; and the receipt given by Brown, for it is to that effect; which give him no power over the bond, further than to carry and deliver it up to Stoney, and with respect to McNeill, Brown proved, after he was sworn, that when McNeill paid the money to him, he at first objected, as having no right to receive it or power over the bond, and that he, McNeill, replied that he did not care a damn about it whether he had power or not, all he wanted was for Brown to sign the receipt on

STONEY, vs. M'NEILL.

the bond. From this plain, simple state of facts, it appears to me that the jury acted judiciously in disregarding the receipt of Brown on the back of the bond, and in considering it as a fraud on the assignee. As to the circumstance of Brown's keeping the bond in his hands for two years, that did not alter the original trust when the bond was delivered to him, an iota. It gave him no authority to receive the money and discharge the defendant; and if he had kept the bond in his possession to the present day, he would still have remained a trustee for Mr. Stoney.

5th. Brown's testimony. As to the admission of Brown as a witness. It appears to me that he was not called to defeat his own guarantee. (If it was legally entered into.) He admitted it; and, therefore, was called upon to swear against his own interest, and, in this respect, against himself; and it is a rule of law, that a witness is not good for himself, but is the best evidence against himself; 1 Esp. Rep. 21. But the great object of Brown's testimony was to shew a knowledge of the transaction between himself and M'Neill, and that the latter knew that the bond had been transferred to Stoney, at the time he persuaded Brown to receive the money and give him a discharge, and that he, the defendant, was a *particeps criminis*. On the other hand, it was contended that Brown had such an interest in this case as disqualified him from being a witness, and therefore, that the court erred in permitting him to be sworn on the trial. On the question of Brown's interest, it is necessary to take a short view of the relative situation of both parties. M'Neill was one of the obligors of the bond, and Brown the voluntary guaranty of the payment, in case of the insolvency of the obligors. M'Neill says, the bond is paid, legally paid to Brown; according to this, Brown is discharged from his guarantee. Yet, when Brown is called upon as a witness to prove this payment, he is an interested witness upon this guarantee, and because he is about to swear that the bond has not been paid off, whereby he will revive his own responsibility as a guarantee, (thereby fixing the debt upon himself,) he ought to be excluded. The fallacy of the argument is so apparent, that it is only necessary to state it, to shew its inconsistency. It creates and destroys, ~~and flatly~~. But is said, it is fixing the debt upon M'Neill, this,

STONE, vs. McNEILL.

however, does not fix the debt upon one more than the other, and he is still swearing against his own interest, for McNeill may not pay the debt after Brown proves it to be due, and then he must be responsible. And this brings me 6thly, to consider what kind of interest will exclude a witness from giving testimony.

It cannot be necessary at this time, to turn to many authorities to prove that contingent and remote interests will not exclude a man from being a witness. Courts of Justice at this day incline to admit witnesses, seeing it is better to leave their testimony to a jury than to exclude, where their interest is not immediate and direct. In Brent and Baker, 3rd Term Rep. 32, Lord Kenyon quotes Lord Mansfield, as having laid it down, that the old cases on the competency of witnesses have gone on very subtle grounds: But of late years, the courts have endeavored as far as possible, to let the objection go to the credibility rather than to the competency of a witness. Lord Hardwick, in the case of King, vs. Bray, says, that whenever a question of this sort is raised, he was always inclined to restrain it to the credit rather than the competency of the witnesses; and Lord Kenyon himself says, he concurred in the above rules, and added that it was better to receive the evidence of the witness and submit it to a jury, rather than to reject upon the ground of incompetency; and Judge Buller in page 36, approved of what was said by Lord Harwicke, that it was better to lean against the objections to the competency of a witness and let them go to the credit of the witness; for says he, the true line is this, will the witness gain or lose by the event of the cause? and if the verdict could not be given against him in any other case, he ought to be admitted. Grose, J, said the question was whether the witness was or was not interested in the cause; and if he is not, then he ought to be admitted. Then again, as to a remote or contingent interest. In Term Rep. 164, the court said, that the bare possibility of an action being brought against a witness, is no objection to his competency. In that case, a security to an administration bond, was admitted as a witness for the administratrix; a case as strong, if not stronger than a guarantee, being a witness in a case of his collateral undertaking. Now it appears to me that Brown was

STATE, vs. LARUMBO.

only to be liable on his guarantee, in default of M'Neill's solvency. It was, therefore, that kind of remote interest which did not exclude him from being a competent witness, and the judge below could not legally exclude him, but on the contrary, very properly permitted him to be sworn as a witness. The last objection I shall observe upon, is, the objection to the want of an affidavit of a subsisting debt, filed with the declaration. If this objection was a solid and available one, the defendant ought to have demurred for want of it, which would have struck at the cause of action, but as he did not do so, and pleaded issuably to the declaration, no less than four separate pleas, and concluded to the country in them all, I am of opinion, it is too late to take advantage of it after verdict. Upon the whole, after considering all the grounds, I am of opinion that there are no legal reasons for a new trial and that the rule ought to be discharged.

Grimke, Petigru and Harper, for motion.

Hunt and Prioleau, contra.

Colcock, J, concurred in the foregoing opinion of Justice Bay.

THE STATE vs. ANTONIO LARUMBO.

The defendant and another were indicted together for larceny.

The jury found one guilty of grand the other petit larceny, the proof being the same against both. Motion for new trial granted.

ANTONIO LARUMBO, together with one Cassada, was in May term last, for Charleston district, tried on a charge of grand larceny. Cassada was found guilty of petit larceny and Larumbo of grand larceny. The defendant, Larumbo, appealed for a new trial, on the ground, that the verdict was inconsistent, in as much as the defendants being indicted together for grand larceny, and the same evidence against both, both were alike guilty.

The opinion of the Court was delivered by Mr Justice Gantt.

There is certainly an apparent inconsistency in the discrimination which the jury have made as to the guilt of these several defendants, who were implicated in the same indictment.

M. LAHIFFE & M. O. LAHIFFE, vs. HUNTER.

the offence charged against each was the same, and the evidence equally affected both. The court, therefore, in the exercise of that discretion with which they are invested, are of opinion, that a new trial should be granted.

Nott, Johnson and Bay, Justices, concurred.—*Colcoc'*, Justice, I dissent.

Wright, for motion.

Attorney General, contra.

MARY LAHIFFE & M. O. LAHIFFE vs. JOHN HUNTER.

Trespass to try title, on writ on enquiry. Plaintiff's declaration claimed a plantation called 'Green Grove,' lying &c. but set out no metes or bounds: Held that there was no such uncertainty of description, as to afford cause for arresting the judgment.

Defendant was not allowed, in mitigation of damages, to give evidence of his having been put in possession of the premises, by the verdict of a jury, on a trial for forcible entry;

Nor that since the bringing of the action, he had been appointed guardian of the person and estate of one of the plaintiffs.

THIS was an action of trespass, to try title to a plantation called Green Grove, described in the declaration as lying on the N. E. side of the road to Ashley ferry, but no metes or bounds were set forth.

The case had been placed on the writ of enquiry docket. To diminish the damages, the defendant offered the evidence of a magistrate, who had tried a case of forcible entry and detainer in 1802, for the purpose of shewing that the defendant was put into possession of this tract of land by the verdict of a jury. This evidence was rejected. The defendant also offered evidence to shew that he had been appointed guardian, by the court of equity, of the person and estate of M. O. Lahiffe, in February, 1821; which was likewise overruled. It was proved that the land was worth from \$150 to \$200 pr. annum, and that the plaintiff Mary Lahiffe had sustained particular inconvenience from having been kept out of possession of Green Grove. On the part of the defendant, it was proved that the land was very poor, and a support could with difficulty be made from its cultivation. The defendant had been in possession for nine or ten

M. LAHIFFE & M. O. LAHIFFE, vs. HUNTER.

years. A verdict was found for the plaintiffs, with sixteen hundred dollars damages. A former jury had given two thousand dollars damages and the present finding was on a new trial. The defendant again moves for a new trial and in arrest of judgment, on the following grounds:

1st. On the ground of the rejection of the evidence in relation to the defendants having been put into possession.

2d. On the ground of uncertainty of description in the declaration.

3d. Excessive damages.

4th. Rejection of evidence of defendants' guardianship.

5th. On the inadmissibility of evidence to show particular inconvenience sustained by Mary Lahiffe's not having possession of Green Grove, &c.

The opinion of the Court was delivered by Mr. Justice Gantt.

The only question for the consideration of the jury, on the execution of this writ of enquiry, was the extent of damages which the plaintiff had sustained. No question of title was to be tried. Had the defendant's possession been a lawful one, it was incumbent on him to have pleaded it in justification. The evidence of possession, under colour of law, was therefore properly rejected. The objection to the generality of description, in the declaration comes too late after verdict. Neither can it avail the defendant that he had been chosen guardian of the person and estate of M. O. Lahiffe, after action brought, besides the interest of the ward will remain in his hands, over which Mary Lahiffe will have no control. On the ground of excessive damages, it is to be considered that this is a second verdict; a former jury gave two thousand dollars, and although the land was unproductive, still it was a convenient habitation to the plaintiff, as well as others, and the proofs offered, established its value at \$150 or \$200 pr. year. After an adverse possession of nine or ten years, the defendant cannot with justice complain of the verdict of the jury. The question of damages was one proper for the jury alone, and although the damages when viewed in reference to the value of the land, appear to be high, yet it is to be considered that they are less than were allowed by a former

CALDER, vs. DELESSELINE.

jury. The court think that a new trial should be refused.

Bay, Nott, Johnson and Huger, Justices, concurred.

Cross & Gray, for the motion.

Hunt, contra.

JAMES CALDER, vs. F. G. DELIESSELINE.

The act of assembly of 1822, authorizing sheriffs to seize "free negroes or persons of color" on board vessels coming into port, and to detain them 'till the vessel is ready to depart, does not relate to slaves.

The opinion of the Court was delivered by Mr. Justice Gantt.

THIS was an appeal from the decision made by the circuit court, for the district of Charleston, on the judgment given by John B. White, esquire, a magistrate in affirmance of that judgment. The case was, that the sloop Bob, M'Kee, master, of Nassau, New-Providence, manned by the master, a white man, the mate, a free man of color, and four slaves, seamen, (all stated to be British subjects,) arrived at Charleston in the beginning of January 1823, consigned to James Calder, a British merchant, resident in Charleston. On Saturday, 11th January, after the vessel had cleared at the custom-house and was preparing to go to sea, about 5 o'clock in the afternoon, in the absence of the master from the vessel, the sheriff's officers went on board the vessel and arrested the mate and seamen, and carried them to gaol. The consignee and master of the vessel waited upon the defendant and demanded the release of the men, and the defendant, so soon as he became satisfied that they were immediately about to depart, discharged them upon the payment of the accruing fees, say \$18 31 $\frac{1}{4}$.

The seizure was made under the act of assembly of Dec'r. 1822. The third section authorizes the seizure of any free negroes or persons of color, on board vessels coming into port, and to detain them 'till the vessel is ready to depart, &c. On the trial of the case before the magistrate, the circumstance of three of the persons seized being slaves, was not as appears insisted upon. The men detained were considered as British subjects, and as such it was conceived that they were protected from

WALKER, vs. MATHANEY.

seizure, under the treaty of commerce between the United States and Great Britain. The same view was presented to the judge before whom the appeal was made, and the judgment of the magistrate was affirmed. The attention of the court has now been drawn to the construction to be given to the act of assembly of 1822, and as the defendant has admitted that the four seamen were slaves, their seizure and detention could not be justified under the provisions of the act, which has reference to free negroes or persons of color, and not to slaves. A new trial is, therefore ordered in the case.

Bay, Nott, Colcock & Johnson, Justices, concurred,

JOHN F. WALKER, Administrator of Davis, vs. WILLIAM MATHANEY.

In a proceeding by summary process, defendant was required to answer on interrogatories, whether he had made his mark to a note, and whether he justly owed an account; copies of which were filed with the process; and held that a decree, for the amount of the note and account was properly given against him, on his neglecting to answer.

THIS was a summary process, upon a note and account, copies of which were endorsed on the copy process, together with the following notice, viz: The defendant will take notice, that he will be required, upon the trial of this case, to answer the following interrogatories upon oath, or judgment will be given against him by default:

1st. Interrogatory. Did you or did you not make your mark to a note, of which the above is a copy? if so has or has not that note been paid by you?

2d. Interrogatory. Is the above account just or unjust; if unjust state the reasons why it is so? On the trial the defendant failed to answer the interrogatories, and the plaintiff's counsel moved for a decree without offering any testimony, which was opposed on the part of defendant, on the ground that the nature of the demand was not such as to authorize the plaintiff to call for the oath of the defendant, or if it was, that according to the rules of this court and the laws of the state, the plaintiff was not entitled to a decree, without offering any evidence, merely on

WALKER, vs. MATHANEY.

the failure of the defendant to answer the interrogatories. The presiding judge, however, gave a decree for the plaintiff for the amount of the note and account, and the defendant moves; 1st. For a non suit, and if denied, 2d. For a new trial.

The opinion of the Court was delivered by Mr. Justice Gantt.

By the act of 1769, (Pub. Laws, 270,) the common law courts are invested with authority to try and determine, without a jury, in a summary way, on petition, all causes cognizable in the said courts, for any sum not exceeding £20 sterling, except where the title of lands may come in question, in which suit, the plaintiff and defendant shall have the benefit of all matters, in the same manner, as if the suit were commenced in the ordinary forms of common law or equity, and by the 36th rule of the court of common pleas, if the plaintiff shall, in a case of summary process, desire to have the benefit of the defendant's oath he shall state in writing the points to which he shall require his oath, and serve him with a copy thereof, with notice of such his intention, and defendant may either give his answer in writing, or ore tenus in open court.

The defendant in this case, having been duly notified of the plaintiff's intention, under the rule, to avail himself of his oath, and having failed either to answer the interrogatories propounded in writing, or ore tenus, in open court, judgment was given against him, pro confesso, for the amount of the note and account. Could either have been established by the rules of the common law, then recourse to the defendant would have been unnecessary, and it is conceived that the rights of the defendant can never be compromised, when it rests with himself to say whether he owes the amount sued for or not. His refusal therefore to answer, in a case so simple, and involving not the slightest complication, could leave no other impression but that the several accounts were justly owing by him to the plaintiff, and that his neglect to answer was to be construed into a tacit and satisfactory acknowledgment of the same. Had the demand been for damages, arising from a trespass committed, or in any other manner necessarily requiring evidence to satisfy the mind of the court as to the extent of injury sustained; in such case, the plaintiff must have enforced his requisition on the defendant by an

DUNN, vs. CITY COUNCIL OF CHARLESTON.

attachment for the contempt. In this case, no such necessity existed and a final decree was properly awarded against him. The motion is, therefore refused.

Bay, Nott, Colcock & Johnson, Justices, concurred.

Patterson, for the motion.

Gantt & Trotti, contra.

JOHN DUNN, vs. THE CITY COUNCIL OF CHARLESTON.

The act of the legislature, of 1817, authorising the City Council of Charleston, for the purpose of widening the streets, to cause "lots" to be assessed, and to take them at the assessed value, only relates to such portions of land as shall be actually necessary for the street.

If so construed as to give the council the power of taking more, the act would be unconstitutional.

THIS was an application to a judge at Chambers, for a prohibition, to restrain the city council from taking from the plaintiff a certain lot of land in Charleston, for the taking of which, they pretended to have derived an authority from an act of the legislature, passed in December 1817.

The suggestion states "that the city council, under color of certain acts of assembly, had pretended to a right to take the lands of the plaintiff a part of which was necessary for a public street. That the plaintiff did not object to yield up so much of his land as was required for the street, but the remainder of his land, consisting of a large and valuable lot, he still held. But the city council pretended, that the legislature authorized them to take not only what was wanted for a street, but the whole; and they had actually sold the whole lot, after taking all that was necessary for public purposes, for double the amount which they offered to give him for it."

In the answer of the city council to this suggestion, they admit they have taken the whole lot of the plaintiff, alledging that they had a right to do so by the act of the legislature above-mentioned.

The first clause of the act, is in the following words: "Whenever the city council of Charleston shall think it expedient to widen any street, lane or alley, they shall first submit

DUNN, vs. CITY COUNCIL OF CHARLESTON.

the plan of the intended improvement to a board of nine commissioners, to be named and appointed from time to time by the legislature, and if approved and sanctioned by the said board, then the said city council shall have full power to purchase the lots fronting on such street, alley or lane, and the fee-simple of such lot or lots shall be vested in the city council from the day of the deed of sale." The second clause provides "that in case the owner or owners of such lot or lots, fronting on such street, alley, or lane, shall refuse to sell his or her lot or lots, or shall demand for the same what may be deemed an unreasonable price by the city council, then the city council shall nominate and appoint not less than three freeholders, resident in the city who shall meet an equal number to be named and appointed on the part of the owner or owners, to determine and fix on the real and true value of such lot or lots, with full power in the commissioners, appointed as aforesaid, in case of disagreement, to call in one other commissioner, and on the city council paying the full value of said lot or lots, fixed and determined on in the manner above designated, the fee-simple of the said lot or lots shall be vested in them. The judge being of opinion that the act authorised the city council to appropriate the whole of the lot belonging to the plaintiff and that they had proceeded according to its provisions, refused the prohibition. A motion was now made to reverse that decision, and for an order that a prohibition should issue.

Hunt, for the motion. If the city council claims by contract, it might have gone into a court of equity, to enforce it. The contract should have been proved, and the disputed facts tried by a jury, not by certificates and affidavits. If the right rests on contract, the council should be prohibited from gaining possession, under pretext of executing the act of the legislature.

I am to enquire first, whether the act of the legislature authorized this proceeding, on the part of the city council; and next, if it did, whether the act was constitutional.

A statute is to be construed according to its object. What the object of this act was, we may collect from its title. It is "an act to appoint a board" &c. "with power to declare in what cases, the streets, lanes and alleys of the city, shall be widened." The object of this act, was, the widening and improvement of

DUNN, vs. CITY COUNCIL OF CHARLESTON.

the streets; and we do not perceive how that object is to be promoted by a construction which will give to the council the power of speculating on the property of the citizens; which has been done in this instance, by selling the lot at an advanced price.

They are authorized to cause "lots" to be assessed, and to take them at the assessed price. No precise definition can be given to the word lot; other than that it is a portion of land. The portions of land actually requisite for the street, are lots; and we think that the words of the act, will be satisfied and its spirit conformed to, by thus restricting its meaning. (Mr. Hunt, was stopped by the court, who requested to hear the other side.)

Toomer, contra. Thought that the legislature intended to authorize the city council to purchase compulsorily, the whole of lots, lying on streets intended to be widened, and that this would appear upon referring to the several acts of the legislature on the subject, and the inconveniences which had been found to result from every other mode, in which it had been attempted to exercise this power. He referred to the acts of 1810, 1811, 1812, 1817 & 1818.

First the council were authorized to take so much land as should be necessary for the actual street. Upon this, individuals complained that fragments of lots of no value were left on their hands. To remedy this, the council were required to purchase such mutilated lots as were rendered of no value, and to pay for them by causing assessments to be made on such property lying on the street, as had been enhanced in value by the improvement of the street. This was not found to be satisfactory, and it was thought advisable to give the council the power of taking, in every instance, the whole lot. The object of the legislature was not merely to provide for widening the street, but to prevent complaints and embarrassment.

That the lot has been sold at an advance of price, does not shew that the plaintiff has suffered any injustice. The increase of price has been occasioned by the improvement of the street, and if he had retained his lot, he would have been liable to be assessed for the enhanced value.

DUNN. vs. CITY COUNCIL OF CHARLESTON.

We do not strictly claim the land by contract; but we rely on the consent of the plaintiff, to subject his lot to the dispositions of the act of the legislature. Three cases are provided for by the act: First, if the proprietor will sell, the council are authorised to purchase. If the proprietor consents to sell, but there is a disagreement respecting the price, commissioners shall be mutually appointed to assess. If he refuses to sell or neglects to name his commissioners, the council may appoint alone.

Powers of government are original or supreme, and delegated. The government of the United States is one of delegated powers. In the case of *Maryland and M'Clloch*, 4 *Wheat*. 415, it was held that the government might exercise implied powers, as means of executing its delegated powers; and that if the means were appropriate, the degree of their necessity was a matter of legislative discretion, and not to be judged of by the court. If the state government were of this description, the doctrine would embrace our case. No one doubts the power of the legislature to make roads. To authorise the city council to take lots for the purpose, at an assessed price, was an appropriate means of exercising this power, and according to the case quoted, was a matter for legislative discretion.

But on how much stronger ground do we stand, when it is recollected that the state government is one of original powers and the legislature supreme; unless in so far as restrained by the constitution. Before the adoption of the constitution, there was no limit to the power of the legislature: *Thomas, vs. Daniel*, 1 *M'Cord*, 359, 60. The legislature possesses this power unless the constitution has taken it away. What provision of the constitution has restrained them in this respect.

The 2d sec. of the 9th art. of the constitution, provides that no one shall be deprived of property, but by the judgment of his peers, or the law of the land. The right of eminent domain was the law of the land, previous to the adoption of the constitution, and was not abolished by it. *Lindsay and others, vs. The Commissioners of East Bay street*, 2 *Bay*, 38. It may be considered as a constitutional exception to the constitution itself, 3 *Eq. Rep.* 78. No one contends that this provision restrains the legislature from taking the land of individuals, which is

DUNN, vs. CITY COUNCIL OF CHARLESTON.

actually necessary for roads. They may take property for purposes of public necessity or utility. But who is to judge of the necessity or utility? According to the opinion of the court of the United States, the legislature itself. The taking of whole lots, was an appropriate means of effecting the object—the widening of the street; and courts are not to judge of the degree of the necessity.

There are analagous instances of the exercise of power, the constitutionality of which every one admits. The labor of the citizens is taken by law, for the purpose of repairing roads; nor are courts and juries called upon to decide when repairs are necessary. Not only is land taken for roads, but timber and other materials, adjacent. The assessing of property which is enhanced in value by the improvement of the street, is the taking away of the property of the citizen.

Haig, against the motion. We are not warranted in giving to the word “lots,” any signification but such as is attributed to it by it, by general usage. The portions of ground so designated are universally understood.

Mr. Haig, quoted Judge Patterson’s opinion, 2d. *Dallas*, 313, that the legislature may take private property for public purposes, making compensation to the individual. The compensation may be ascertained in three ways; 1st. by the verdict of a jury; 2d. by agreement, and 3d. by commissioners mutually appointed. The last of these modes was adopted in the present instance, and if the plaintiff had any constitutional right to resist the taking of his lot, he abandoned it, by joining in the appointment of commissioners.

Hunt, in reply. The court must decide, first, whether the legislature had a right to take land for the actual street; and secondly, whether it could take any thing more.

The power of the legislature, is rested on the right of eminent domain, which is described by writers on the subject, to be the right of taking the property of individuals for purposes of public necessity or utility, of which necessity or utility the government is the sole judge. This is emphatically the right of despotism, and is so termed. If this right exists, all property must be held at the will of the legislature; which is opposed to

DUNN, vs. CITY COUNCIL OF CHARLESTON.

all the notions of the people of this country on the subject of limited and constitutional government.

We deny that the power of the legislature is supreme. Supreme power, according to our constitutions, resides no where but in the people assembled in original convention. *Legislative* power is delegated to the two houses of general assembly, in matters where they are not restrained by the constitution. But it does not appear that this right is a part of legislative power, it seems to appertain, in part at least, to the executive. It is for those who contend for the right, however, to shew where it is vested.

Unquestionably there must be roads in every civilized country, and if there is no constitutional authority to warrant it, the public must do wrong to individuals and take the right of way over their lands. If it depends on this right of necessity, the principle cannot be extended further than the most absolute necessity requires. Necessity, does not mean convenience. But for the purposes of roads, it is not necessary to take the soil at all. The right of way is all that is required, which does a temporary injury to the individual, without divesting him of the title to his property. If we are right in supposing the power of the legislature delegated, there cannot be a sub-delegation of that power to the City Council of Charleston.

The argument against the motion, is, that the legislature, having the power to make roads, may at their discretion, use all means which they may think appropriate to that object. If so, the power is unlimited and despotic, and there can be no question for courts, on the subject of the violation of the rights of property, by the government. If the courts can exercise any control, it is no longer the right of eminent domain. The case of *Lindsay and others, vs, the Commissioners of East Bay Street*, is not authority, for the judges were equally divided. The rights of the citizens of this country, are guarded not by the constitution alone, but by the general and universally recognized principles of right and wrong. If the legislature may take from this individual, property to the amount of one or two thousand dollars and give it to the City Council, they may do so to any amount, they may take his whole property.

DUNN, vs. CITY COUNCIL OF CHARLESTON.

The constitution provides that the right of trial by jury shall be preserved inviolate as heretofore. The rights of the citizen are not to be submitted to extraordinary tribunals. 2 *Dall.* 213; *Serf. on Common Law*, 347. The compensation to be given, under this act of the legislature, is fixed by commissioners, not deciding under oath nor having power to compel the attendance of witnesses. The citizen has not only the right to a trial by jury, but by a jury as heretofore, instructed by independent judges, selected for their knowledge and integrity, and placed above the reach of ordinary temptation.

We deny that the legislature has the right, which is assumed to be admitted, to assess property which is enhanced in value by the improvement of the street, to pay the expense of making it. On the same principle, property lying any where else might be taxed for the same purpose. The legislature has no right to improve my property, against my will, at my expense.

The opinion of the court was delivered by Mr. Justice Nott.

This case presents the two following questions for the consideration of the court:

1st. Whether the act of 1817, authorizes the City Council to take any more of the land belonging to the plaintiff, than was necessary for the purpose of widening the street?

2d. If it does, whether the legislature, in delegating such authority, have exceeded their constitutional powers?

The argument appears to me to have taken a much more extensive range than was necessary to the decision of the question submitted. In the course of the discussion, an inquiry has been made, not only into the power, and the extent of the power which a government possesses to appropriate the property of individuals to public purposes; (which by civilians, is called the eminent domain;) but also in what branch or department of the government that power is vested.

With regard to the first, I think, we may, without any affectation of learning, venture unhesitatingly to affirm that every government, whatever may be its form, must possess such a power. It is an essential attribute of sovereignty, without which no government can exist. To what other various

DUNN, *vs.* CITY COUNCIL OF CHARLESTON.

objects the principle extends, is not now necessary to be inquired; but that it embraces the right to take private property for any public purpose, I think, too clear to admit of doubt. The laying out of roads, cutting canals, building fortifications, erecting public buildings, and even establishing of towns, are matters of public interest and utility, which frequently render it indispensable that private right should yield to public necessity, and that individual interest should sometimes be sacrificed to the public good.

I am also of opinion, that as a general principle, the branch of the government in which such power is vested, must judge of the necessity of exercising it, and the extent to which it may be exercised; and in the exercise of which discretion, it cannot be controlled by any other branch. I do not know that it is necessary to inquire to what branch of the government the power belongs. But if it were necessary, it does not appear to me that it would be a question of difficult solution. I have already said that it is an essential attribute of sovereignty. Wherever the sovereign power is lodged, that constitutes a part. In absolute monarchies, all power centres in the monarch; in mixed governments, it will depend upon the structure of the constitution. In England, I take it, that it is vested in the king and parliament jointly. For although the parliament is said to be omnipotent; yet as the king has a negative upon the laws, the expression regards him as constituting an integral part of the parliament. In republics, the sovereign power is in the people, but except in pure democracies is exercised by their representatives. The American states may be called representative republics. In some of them, the executive constitutes a part of the legislative authority, as in England; in which case, this eminent domain is in these two branches of the government. In South Carolina, I think, it is lodged in the legislative body, which consists of a senate and house of representatives.

I do not consider the judiciary as possessing any part of it. The judges are the ministers of the law. Their province is limited to the exposition of the law and of the constitution. The legislature therefore possesses all the power which the people themselves possess; where it is not restricted by the constitution.

DUNN, vs. CITY COUNCIL OF CHARLESTON.

and where the power is not delegated to any other branch of department of the government. It is said, that the power exercised over the life and liberty of the citizen, is a part of the eminent domain, in which the judiciary participates, and therefore it may exercise a controlling power over the acts of the legislature. But I apprehend that this is a mistake. The judiciary cannot create an offence nor prescribe a punishment. It can only administer the law according to the constitution. An act of the legislature is never referred to the judiciary, to determine whether it is just or unjust, but whether it is constitutional. I am not aware of any case where the judiciary can declare a constitutional law void. If the legislature should declare that picking an apple from a neighbour's orchard, or a cabbage from his garden, should be a capital felony, although we might think it severe and cruel, we should be bound to obey.

The right of the court to control the legislature, is derived from the constitution. It is indeed the constitution itself which controls and not the court. Being the supreme or fundamental law, the legislature, as well as the judiciary, must conform to it. Whenever, therefore, an act of the legislature comes in contact with the constitution, the latter must prevail. It is thus that the judges, as the organs of the constitution, declare an act of the legislature inoperative, because it clashes with the supreme law. I cannot conceive upon what grounds the judiciary can claim a supremacy over the legislature, as long as they confine themselves within the pale of the constitution. The people have consigned to each branch of the government its respective powers, and the limits of its authority are to be found only in the constitution, and it would be an usurpation in either to invade the province of the other.

But it is unnecessary to pursue this subject in the present case, since we profess only to enquire what the legislature have done, and whether they have acted within the scope of their constitutional power. The first depends upon the construction to be given to the act of 1817. If we confine ourselves to the letter of the law, it certainly will admit of the construction contended for on the part of the city council: but Lord Coke says, "*Qui hæret in litera, hæret in cortice.*" It is taking a superficial view of an act; to adhere to its letter. We must

DUNN, vs. CITY COUNCIL OF CHARLESTON.

look to the spirit and design of the law. When we look through the several acts of the legislature, the object is apparent. The first act on the subject authorized the council to take as much as should be necessary for the purpose of widening the street and no more. This led to complaints on the part of the landholders, that they received compensation for the part which was taken off only, while the fragment which was left, was of no value to them. The next, required the council to take the whole, where the owner did not wish to retain the remaining part. The provisions of the last act have been quoted.

Through the whole we observe a scrupulous regard to the rights of the individual and a manifest disposition to do him justice. The object contemplated, is the widening of the street, but the owner of the lot is to be indemnified. The City Council are authorized to take what is sufficient for the purpose contemplated. They are required to take the whole, if the owner requires it; but they are not authorized to arrest from him what is not necessary, against his will. The act authorizes them to take the "lot or lots fronting on such street, alley or lane," &c. The word *lot* is of ambiguous import, and although when speaking in relation to town lots, we usually have reference to some particular portion or section of the town, yet we have no definite idea of any given quantity of land. The word *lot* is sometimes used in reference to an enclosure, without regard to the quantity of land embraced. In the present case, it must mean either all the land that the plaintiff owned, or so much as was necessary for the street, and from any thing that could have been known *a priori*, he might have owned several acres more than was necessary for that purpose. Suppose the act had made use of the word *land*, instead of *lot*, would it have authorized them to have taken all the land, be it more or less, which he might have had there? I apprehend not. The words "*lot*" and "*land*" may be considered synonymous in the construction of this act. I am of opinion, therefore, that the construction which best meets the views of the legislature, and which best comports with the true spirit and design of the law, is to give to the City Council the power to take as much land, or such parts of the lots, as is necessary for the street and no more.

DUNN, vs. CITY COUNCIL OF CHARLESTON.

It has been contended that the legislature may have considered, that more than merely enough to run the street upon, might be necessary, to enable them to carry into effect that specific object, and therefore intended to give the whole, as timber, growing on adjacent land, is sometimes given for the purpose of keeping in repair a road which is authorized to be laid out: and that the extent as well as the existence of the necessity, is a matter of legislative and not judicial discretion. If the act had in express terms declared, that the whole was necessary, and had in words too strong to admit of any other construction, authorized the taking of the whole of the plaintiff's possessions, it might have presented a question of no little delicacy and perhaps of difficulty. But no such difficulty occurs in this case. The suggestion states expressly that the City Council, after taking what was necessary for the street, have taken the remainder of the lot, and have actually contracted to sell it at a considerable profit. That statement is not denied by the answer, but the proceeding is attempted to be justified under the act of the legislature.

This brings me to the second question, which is, whether the legislature has the constitutional right of taking the property of one individual and transferring it to another, or to a body corporate for their own individual benefit and emolument. That is a position however, which the council have not attempted to maintain, and from the construction which has been given to the act, it has become unnecessary that it should be decided. If however, it were necessary, it does not appear to me to be one of difficulty.

The constitution declares, "that the trial by jury shall be preserved as heretofore." It also further provides that no free man shall be "disseized of his freehold, liberties or privileges, or out-lawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land." Various opinions have been entertained of the meaning of those words, "the law of the land," but all the commentators have considered them as intending, in some way or other, to operate as a check upon the exercise of arbitrary power. Our constitution is based upon certain known

DUNN, vs. CITY COUNCIL OF CHARLESTON.

and recognized principles of common law and common justice. Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the *law of the land*: Thus for instance, to subject a person to a capital or other punishment who had committed no crime, to convict one of an offence, otherwise than according to the ordinary course of justice, to take the property of one man and give it to another, would all be contrary to those immutable principles of justice and common law, which have been consecrated by universal consent from time immemorial, and which are secured to us by the plain and unequivocal language of the constitution. Such acts as these would go to deprive a man of his "life, property and privileges without the judgment of his peers," and contrary to "the law of the land."

Such would be the effect of the act in question, to give it the construction contended for by the City Council, because the proceedings admit that they have taken from the complainant more of his land than was necessary for widening the street, and that against his consent. The judges would, therefore, be authorized to declare it inoperative and void. Not on account of any inherent power in the judiciary to control the sovereign authority of the state; but by virtue of their constitutional duty, so to expound an act of the legislature as to make it conform to the constitution, which is the supreme law of the land. But it is not necessary to pursue this inquiry, as the question does not necessarily occur in this case, and I have taken it up only, lest it might be supposed I entertained some doubts upon the subject. I am of opinion the prohibition ought to be granted.

It has been intimated in the course of the argument, that the City Council are entitled to the land in question, by purchase from the owner. If so, they may proceed upon their contract, to compel him to make titles. That is a question which could not be heard in this court, and it is not the intention of the court, by this decision, to prejudice their claim in that respect.

Richardson & Johnson, Justices concurred.

Hunt, for motion,

Toomer & Haig, contra.

SINGLETON, vs. BREMAR.

Huger, Justice—I concur in this judgment, not because the act has not given the power contended for, but because that act, so far as relates to the whole lot is unconstitutional.

Colcock, Justice—I concur in the result, that the prohibition do issue.

TABITHA SINGLETON, vs. ELIZA ELLIOTT BREMAR, *Widow and Administratrix of F. Bremar, deceased.*

Letters, which were received through the Post-Office, may be submitted to the jury, to infer whether they were written by the direction of the plaintiff, who cannot write, on internal evidences such as that they state facts which could only be known to the plaintiff, or contain many circumstances which could relate to no other person.

As between the original parties to a promissory note, it may be proved to have been given without consideration, though expressed to be "for value received," and if so proved, it is nudum pactum.

Past cohabitation is not a good consideration to support a promise.

THIS was an action of assumpsit, to recover the following promissory notes, which were proved at the trial:

\$2,000

Charleston, 2d October, 1813.

Twelve months after date, I promise to pay Tabitha Singleton, or order, two thousand dollars, for value received.

(Signed)

F. BREMAR.

\$2,000.

Charleston, 2d October, 1815.

Twelve months after date, I promise to pay Tabitha Singleton, two thousand dollars, value received.

(Signed)

F. BREMAR.

The defence was, that these notes were each of them, either nudum pactum, or ex turpi contractu. In support of this defence, the following evidence was offered; proving that the woman Tabitha was a dependant on Bremar, even for the means of subsistence; that she had been first his slave, and afterwards his freed woman, and had notoriously carried on an adulterous intercourse with him, from the time of his marriage to the period of his death.

SINGLETON, *vs.* BREMAR.

Mr. Jervis H. Stevens had known the woman Tabitha, when she was a slave, and belonged to some persons named Singleton; he stated that Bremar bought her more than thirty years ago, and she was living with him till his marriage; that in 1794, he married the lady who is now his widow and the defendant in this action; that he set Tabitha free, but maintained the same intercourse with her; that after some years, he went to live in St. Matthew's Parish, but still maintained Tabitha in town. This testimony was confirmed by captain James Kennedy and Mr. Payne.

Dr. Bryan Gunter, had known the plaintiff, after Bremar went to live in St. Matthew's. She was then maintained by him, and boasted of the connexion and of his generosity. She and her mother and sisters all lived together; the mother went by the name of Lucy Sorrel, and some other names.

Mr. William Fain and Mr. Bartholomew Carroll, had severally hired houses to Bremar, which he took for the plaintiff. The receipts for rent paid by Bremar, from the year 1795, for the houses occupied by the same woman, were produced, amounting to a large sum. The intercourse and the utter dependence of the plaintiff on Bremar, were further proved by the evidence of Mr. Robert Cochran and Mrs. Holly, and carried down to the period of his death.

With a view to the introduction of certain letters, the defendant then read the evidence of M. Glover, which shewed that Bremar was accustomed to take out of the office at Orangeburg, letters with a private mark; and proved that the letters now offered, having such mark, had also the Post-Office stamp, and were found among Mr. Bremar's papers. The defendant submitted the letters themselves, to show by the internal evidence, that they were the letters of the plaintiff; although she cannot write, and the letters were not signed, and the hand-writing not identified. The internal evidence was found, in the language of jealousy towards Mr. Bremar's wife; the mention of Lucy Sorrel and of plaintiff's brother, and the importunate tone in which they were written. But the presiding judge refused to look at the contents, and the letters were rejected for want of proof of the hand-writing.

SINGLETON, vs. BREMAR.

To rebut the supposition that Bremar was a debtor to the plaintiff, the defendant's counsel called for and produced the deed of F. Bremar, dated 4th March, 1794, setting this woman free, by the name of my mulatto girl, Tabitha; also, the records of two other deeds, emancipating Eliza and Caroline, her sisters; and the record of another deed, conveying to her a negro.

In reply, plaintiff produced and proved a deed of F. Bremar, dated the 15th April, 1794, conveying to her by the name of "Tabitha, a mulatto girl, lately belonging to me," two negroes, Sarah and Polly; consideration, her faithful service; also, a deed dated 18th May, 1809, whereby "in case of death," he gives her by the name of Tabitha, a free brown woman, a house and lot in Wentworth street, "having received full value." Plaintiff then proved, by Mr. Cleary, that Bremar had in his life time sold the house in Wentworth street. Two females were then called, who said that plaintiff had once been in possession of the two slaves; and one of them swore that she saw Bremar one day come to the gate and tell plaintiff that he was going to sell these negroes, and she afterwards saw them no more. The same witness testified to the virtuous character of plaintiff; that Bremar had been her guardian, and there was nothing in their conduct but what was fit for the relation of guardian and ward. No evidence connecting the deeds with the notes was offered.

The defendant then offered a certified statement, from the books of the Comptroller General, to show that plaintiff never paid taxes either for the house or negroes above-mentioned, and that she did pay taxes, since the time spoken of by the witnesses, for other property. But this evidence was rejected by the presiding judge.

The presiding judge charged the jury, that these notes, even if voluntary, were not nudum pactum, and that if a man makes a voluntary note, he is legally bound by it. But that it was unnecessary to consider this point, inasmuch as an ample consideration had been proved: 1st. Cohabitation; 2d. Surrender of property. As to the objection against the first of the above named considerations; viz: *ex-turpi contractu non oritur actio*, the presiding judge declared the distinction to be between

SINGLETON, vs. BREMAR.

a promise in consideration of past cohabitation, which is good, and a promise in consideration of future cohabitation, which is invalid. The presiding judge further charged the jury that the sale of the house and negroes, which Bremar had given to plaintiff, was a good consideration for these notes, and that the deed giving the house and lot, in case of his death, was good and effectual to pass the legal estate, and that it was immaterial what the consideration of these deeds might have been.

The jury found for the plaintiff the full amount of the notes and interest. The defendant moves for a new trial for the following, among other reasons.

1st. That the presiding judge refused certain letters to be read, written in a hand not known, but traced to the plaintiff by the proofs offered; viz: that they had been found among the papers of Bremar, had a private mark, such as the Post-master at Orangeburgh described, and the regular Post-office stamp; and the internal evidence, if the contents be examined, shows that they are the letters of the plaintiff.

2nd. That he refused to admit in evidence certified copies from the comptroller's office.

3rd. That he charged the jury, that if the notes on which the plaintiff declared, were voluntary, they were nevertheless good; and charged them further, that even supposing a voluntary note to be nudum pactum, (which he denied,) the plaintiff was still entitled to recover, and had proved a sufficient consideration.

4th. That he charged the jury, that the intercourse which had been proved, prior to the date of the notes, was a sufficient consideration for those notes.

5th. That he charged the jury, that the voluntary deeds produced by the plaintiff were a sufficient consideration for the notes declared on, provided the notes were given on that account; even if those deeds had been the price of future cohabitation.

For the motion, it was argued: That a voluntary note, as between the original parties, is *nudum pactum*. *Fink vs. Cox*, 18 Johns. Rep. 145, 2 Phil. Ev. 11. That no valuable consideration was given for this note, is established by the evidence of the plaintiff's circumstances, and that she was entirely de-

SINGLETON, vs. BREMAR.

pendant on the defendant's intestate. At all events whether the evidence was sufficient to establish this or no, it should have been left to the jury, to whom it pertained to decide on its weight.

The consideration relied on to support this note, (if consideration be necessary,) are the house and negroes, which are said to have been conveyed to her and afterwards given up, and past cohabitation. The alleged deed is void as a conveyance, because it gives a free hold to commence in future. It is not a covenant, which will give an equitable interest and serve as a consideration. Where a deed is not sufficient to pass the estate, but the party must come into Equity, the court will never execute a voluntary agreement. *Coleman, vs. Sarrell*, 3 Bro. Ch. Ca. 12; 1 Ves. Jun. 54; 1 Ves. 514. In favour of a wife, children, &c. Equity will execute such an agreement; but there was no such sanctity in this relation.

The testimony with respect to the slaves, was very suspicious. If it was true, the intestate may have sold for the plaintiff's benefit. If he received the proceeds by her consent, she had no demand against him on that account. A voluntary settlement may be surrendered voluntarily. *Wentworth, vs. Derigny*, Finch's Chan. 69. It is merely a surmise however, that the notes may have been founded on these considerations; and it ought to have been submitted to the jury.

If we have any evidence however, to shew that these notes were founded on a base consideration, it will apply more strongly to the covenant respecting the house and the gift of the slaves. These were at the beginning of the cohabitation.

But it is said, that past cohabitation was a good consideration. In general, a past consideration will not support a promise, unless a legal liability has been incurred. Is there anything peculiarly meritorious in this consideration, to make it an exception? It would be ludicrous to speak of an action of assumpsit, brought on a verbal or implied promise, supported by a consideration of this nature. A voluntary bond or deed may be good, and the cases in the books go on that ground; it is never pretended that they are rendered better by a past consideration of this sort. The case of *Cusack & wife, vs. White*, is relied upon to shew that past cohabitation is a good consideration.

SINGLETON, vs. BREMAR.

Such expressions are used in the opinion which was delivered in that case; but the point did not necessarily arise, and taking the whole opinion together, it is evident no more was meant than that it would not vitiate a bond or covenant.

The rule of law, is, that a bond founded on an immoral consideration is void, and that, as far as we can perceive, without distinction of it's being past or future. *Collins, vs. Blanturn*, 2 *Wils.* 349. Chief Justice Wilmot, in this case remarks, "as to a bond being a gift, that is to be repelled by shewing it was given upon a bad consideration." Would any court entertain a suit on a bond which recited that it was given in consideration that the obligee had committed murder or perjury.

This being the general rule, the exception is to be made of it. An exception was made where the bond was *præmium pudicitæ*; a reparation for seduction; and in the earlier cases, such bonds seem to be supported on this ground alone. *Marchioness of Annandale vs. Harris*, 2 *Pr. Wms.* 432, and the case of *Ord, vs. Blacket*, there cited; *Cray, vs. Rooke*, cases *Temp. Talbott*, 153; *Robinson, vs. Gee*, 1 *Ves.* 254; *Walker, vs. Perkins*, 3 *Burr.* 1568. The case of *Turner, vs. Vaughan*, 2 *Wils.* 340, seems to have been decided on this understanding.

The exception was gradually extended to other cases, where it was supposed that an injury might have been done, though the woman had not been in strictness seduced. But in all such cases it was held a sufficient answer to say she had been a common prostitute. 2 *Vern.* 242; 9 *Mod.* 340.

But it may be asked, have we shown the woman to have been a prostitute in this case? Though it may sound harshly, we have shewn what is equivalent. When the intercourse commenced, she was a slave; as to whom our laws do not recognize marriage, nor consequently chastity. And owing to the degraded point of view in which such persons are regarded, it was not practically an injury, as respected either her reputation or means of support.

Other cases, in courts of equity, seem to have determined that bonds or settlements, founded on past cohabitation, shall always be considered voluntary. *Hill, vs. Spencer*, *Amb.* 641; *Gray, vs. Matthias*, 5 *Ves.* 286. Never, however, have they been considered as better than voluntary.

SINGLETON, vs. BREMAR.

When the question arises in a court of law, it seems that the consideration is matter of fact, and proper for the determination of the jury. It is proper that they should have the power of deciding whether the settlement has been obtained by the arts of an abandoned woman; or whether the man has done no more than in honor and conscience he was bound to do.

As to the letters which were offered as the plaintiff's, we think that on the circumstances proved, and the internal evidence, they ought to have gone to the jury. This is not a new sort of proof. One who has corresponded with another is allowed to prove his hand-writing, though he may never have seen him write. In such case, the witness first ascertains the genuineness of the writing by internal evidence; such as that his correspondent speaks of matters which could be known only to himself, or which no other person would be likely to mention.

Against the motion. The notes on which the action is brought, express to be for value received; and this is sufficient evidence of consideration. It lay upon the defendant to shew that they were given upon no consideration or upon an illegal consideration. The presumption is in favor of the validity of the notes; and certainly there is more evidence of a precedent valuable consideration, from the sale of the house and negroes, than there is of subsequent cohabitation. It is a general rule that promissory notes carry on their face evidence of consideration. 7 *Johns. Rep.* 321; 8 *Johns.* 465; 9 *Johns.* 217; 5 *Wheat.* 277. The promise by the intestate, to give the house after his death, and the surrender of the two slaves by the plaintiff, clearly constituted a legal and valid consideration for the notes; and when there may be both a valid and an illegal consideration, the law will refer the contract rather to that which is valid than to that which is illegal.

It is admitted that the paper promising to convey the house, is not a deed; but it is contended that it may operate as a deed: it expressed to be for value received, and contained a general warranty. One may covenant to stand seized to the use of another, for the life of the grantor, remainder to such other; and the statute executes the use, *in presenti*, 3 *Com. Dig.* 253, *Tit. Covenant*. All that is necessary to such a

SINGLETON, vs. BREMAR.

covenant is, that the grantor should be seized at the time. 2 Wils. 75. In the construction of covenants, the court always looks to the intention; and there can be no doubt about the intention of Bremar. If one covenant with another, that if he (the grantor) die without issue, he will stand seized to the use of such other, it is a good springing use. 2 Lev. 77; *Coltman, vs. Senhouse*, 2 Lev. 225; *Co. Lit.* 154, b.

If the bill of sale of the negroes was upon an immoral consideration, the court would not interfere to restore them to the intestate or his representatives. He was *particeps criminis*; *volenti non fit injuria*. 1 Salk. 22.

Past cohabitation is itself a good consideration. *Chit. on Bills*, 93; 2 *P.Wms.* 432; 2 *Wils.* 339; *Amb.* 642; 2 *Cowp.* 742. It is said that these cases proceed on the supposition of a wrong done; but this conclusion is at war with the cases; and it will be found upon investigation, that a reasonable and conscientious motive to a contract, is a sufficient consideration. "The ties of conscience are sufficient for an honest man." *Pr. Ld. Mansfield*, 1 *Cowp.* 290. It is not true that a past is not a good consideration: although it would not of itself raise an *assumpsit* in law, yet an actual promise, founded on it, is good. 1 *Com. Dig.* 192, *Tit. assumpsit*.

The act of the legislature, 1 *Brev. Dig.* 68, renders void any deed or devise to a woman with whom the grantor or testator lives in adultery, if it be for more than one fourth of his estate; and this raises a strong implication that the gift is so far valid. It does not appear that these notes amount to one fourth of the intestate's estate.

To authorize the admission in evidence of the letters which are said to be the plaintiff's, it must first be proved that they were written by her, or by her authority. Of this there is no shadow of evidence. It is a strange doctrine that you shall first give their contents in evidence, to get at the internal evidence of their authenticity.

In reply. As to the admissibility of the letters, were cited *Young, vs Stockdale*, 2 *Nott & M'Cord*, 531; and *Hopkins, vs. De Graffenreid*, 1 *Bay*; in which proof of hand-writing was dispensed with, as being established by internal testimony. See also, *Canty, vs. Platt*, 1 *M'Cord*, 260.

SINGLETON, vs. BREMAR.

The question, whether these notes were voluntary or not, was necessary to a determination of this case, and ought to have been submitted to the jury. It is admitted that a deed, although voluntary, is good, on account of its solemnity. It has never been questioned that a voluntary verbal promise to pay or give money is not binding. The law recognizes but two descriptions of contracts; by deed and by parol; the last of which covers both written and verbal contracts. There is no distinction between written and verbal contracts, except where convenience or policy requires; as in favor of commerce, under the custom of merchants; or to revive a debt barred by the statute of limitations, or contracted during infancy. *Laws on Plead.* 54; 3 *Bos. & Pul.* 249; 5 *Johns. Rep.* 275; *Cro. Eliz.* 442; 756, 873, 885; 15 *Johns.* 145; 17 *Johns.* 301; 2 *Ves. Jun.* 111; 2 *Phil. Ev.* 11; 7 *T. R.* 346; 1 *Schoal. & Lef.* 327; 1 *Strange*, 674; 1 *Fonb.* 337, n. 4 *Mod.* 242. Considerations are founded either on a legal tie or moral obligation. 2 *Pothier on Obligations*, 2. *Nuda pacta* are left to the parties and impose no legal obligation. *Vinnius*, B. 3, Tit. 14.

The case from *Ambler*, 641, is the strongest in support of a contract made in consideration of past cohabitation; and in that case, the court proceeded on the ground that the bond was a gift, and that the want of consideration could not be averred against a bond. The court of equity has refused to carry into effect contracts founded on the consideration of past cohabitation. *Priest, vs. Parrott*, 2 *Ves.* 160; *Matthews, vs. Eld*, 1 *Maddock*, 558. The cases in which such contracts have been supported are put on the grounds, either of positive injury done, as by seduction; or that the bonds themselves imported a consideration, which was not controverted by the facts.

There is a distinction between executed and executory contracts. If they are executed upon an illegal consideration, the maxim, *melior est conditio defendentis*, applies. *Co. Lit.* 206, b.

A covenant to stand seized to uses, like all others, must have a consideration either valuable or good; nothing short of blood will do.

SINGLETON, vs. BREMAR.

The opinion of the court was delivered by Mr. Justice Nott.

The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of the hand writing. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must, therefore, be resorted to, and why may not the letters be looked into. If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances, which go to strengthen the presumption. In ordinary cases, such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the hand writing, therefore, is higher evidence. But in the present case, the evidence offered was the best which the nature of the case could afford. Whether it would have been sufficient to establish the fact, is another question, but I think it ought to have been submitted to the jury.

The certificate from the Comptroller's Office, I think, was properly rejected: It was the certificate of a clerk only, and therefore was nothing more than a private paper. The certificate of the Comptroller himself, is required by the act of the legislature, (1st. Brevard, 319,) to render it competent evidence. The inducements which led to that act, probably were the inconvenience which would result from frequently calling a public officer from the duties of his office, and also the credit which is due to a person high in office and in whom great confidence is necessarily reposed, but none of these reasons can apply to the clerk, and therefore it cannot be supposed that he was intended to be embraced by the act.

The next ground relates to the charge of the judge, in which he instructed the jury, that even if they were of opinion that this was a voluntary note, the plaintiff was entitled to

SINGLETON, vs. BREMAR.

recover. By a voluntary note, I understand, is meant a mere gratuitous promise, without any consideration. The payment of such a note certainly cannot be enforced in a court of common law. By the principles of the common law, a consideration of some sort is necessary to every contract, but bonds and other specialties, from the solemnity of the seal, carry with them intrinsic evidence of consideration, which cannot be controverted, unless the consideration be unlawful. Judge Blackstone seems to think (2 Com. 445,) that simple written contracts derive the same solemnity from the subscription of the maker, that special contracts do from the seal, and justice Wilmot, lays it down as doubtful whether any contract in writing can be considered nudum pactum. *Pillans & Rose, vs. Van Mierop & Hopkins*, 3 Burr. 1663. But it is settled that the mere reduction of a contract to writing, will not change its character, and that a contract, though in writing, is void, if without consideration. In the case of *Rhann, vs. Hughes*, 7 Durnford & East 346, which was referred to all the judges of England for their opinion, it is said that there are but two kinds of contracts in England, to wit, special contracts, and contracts by parol. That there is no such intermediate or third class, as written contracts, not under seal, and that written contracts not under seal, are mere parol contracts. The consideration therefore, may be enquired into; and the rule applies as well to promissory notes, as long as they are in the hands of the original party, as to other written contracts not under seal; 1 Com. on Con. 12. In the second volume of an American edition of Phillips on evidence, p. 11, it is laid down that in an action by the payee against the maker of a promissory note, the matters of defence, which may be given in evidence under the general issue, are governed by the rules applicable to the action of assumpsit in general. The defendant may show that the consideration of the note was illegal and void, or that it was given without consideration. *Fink, vs. Cox*, 18 Johnson, 145, *Skilling & Haght vs. Warren*, 15, Johnson, 270. As between the original parties, a note without consideration is no more than a parol promise to pay money as a gift, which is not a ground of action; it is a nude pact and void as between the ori-

SINGLETON, vs. BREMAR.

ginal parties to it, and a number of authorities are quoted in support of the doctrine.

The same principle has been laid down in our own courts. In the case of *Rugely & Davidson*, 2nd. Const. Decis. 40, Judge Gantt, who delivered the opinion of the court, says, that between the immediate parties to a negotiable instrument, or to the transfer of such an instrument, it is competent for the defendant, notwithstanding the words "value received," to prove that no consideration had in fact passed from the plaintiff; and in further illustration of the rule, we are almost daily in the habit of permitting the drawer of a note to show that it was given for the accommodation of the payee, although expressing on its face to be for valued received. I think therefore, that the opinion of the presiding judge on that point cannot be maintained.

This brings me to the consideration of the next ground; which is a supposed misdirection of the judge, in instructing the jury, that if they should be of opinion that the note was given in consideration of past cohabitation, the plaintiff was entitled to a verdict. The only cases that I can now recollect, either in this State or in England, where this question has been involved, have arisen upon bonds or deeds, wherein the consideration could not be enquired into, unless it could be shewn to be unlawful; and therefore, where a bond is given in consideration of past cohabitation, it is good, because where the consideration has been gratuitous, the bond must be considered as voluntary. The English decisions upon the subject are considered and seem to be recognized as correct, in the case of *Cusack & Wife*, vs. *White* 2nd Const. Decis. 279. The judge who delivered the opinion of the court in that case, speaking of the case of *Turner and Vaughn*, 2nd Wilson 339, which was an action on a bond, expressed on its face to be for past cohabitation, says, the English judges held it to be a good and "meritorious" consideration. Perhaps that is rather too strong an expression; for although a person may be entitled to merit for making reparation for injured reputation, whether occasioned by seduction or otherwise, the act itself of unlawful cohabitation can never be considered meritorious. I presume, therefore, that past cohabitation, under any circumstances, would not be considered as a consideration on which an action of assumpsit could be

SINGLETON, vs. BREMAR.

maintained, without some written agreement: and it follows from the principles above laid down, that the mere fact of reducing it to writing, or giving it the form of a promissory note, cannot make it so. When the consideration is gratuitous, a promise made afterwards must be considered as equally gratuitous and voluntary; and therefore it must be optional with the party whether he will perform it or not. It is otherwise with bonds, which, though voluntary, must be supported in a court of law. Whether a promissory note, given for the actual injury sustained in reputation by seduction, would be supported, as bottomed on a good consideration, is a question which does not occur in this case; but I am satisfied that if the notes in question were given in consideration of cohabitation, though past, they must be considered as voluntary and the plaintiff's action must fail.

With regard to the last exception to the opinion of the court, in which the jury were instructed, "that if the notes were given in consideration of property surrendered to the plaintiff, even though that property had been given in consideration of future cohabitation; the plaintiff was entitled to recover," I think as an abstract rule of law, the opinion was correct. With regard to the application of it to this particular case, I am not disposed to express any opinion. That will afford a subject for the consideration of the jury, whenever the case shall be again submitted to them. If a person should actually transfer property by deed, properly executed, accompanied by delivery and possession of the property, I think it could not be reclaimed, even though the title were founded on a base consideration. I think the rule would apply, *melior est conditio possidentis*; and when property is actually vested in a person, a revestiture of it will be a good consideration for a promise. But a mere pretended transfer, for the purpose of giving colour to the transaction, could not promote the object, nor would a voluntary surrender of the property, by which the parties were left in statu quo, raise a consideration for a future promise.

The evidence in this case, has afforded an ample field for speculation, if we had been disposed to give expression to the reflections to which it was calculated to give rise. But I have forbore to give any opinion upon the facts, or the policy con-

214 SOUTH-CAROLINA STATE REPORTS.

SINGLETON, vs. BREMAR.

ected with the case, for whatever may be the relation in which the parties stand to each other, the case ought to go down, uninfluenced by the opinion of this court, to be tried upon it's merits, if any merits it has; of which the jury must judge.

A new trial is granted—*Bay, Johnson & Huger*, Justices, concurred.

Retigra & Harper, for motion.

Hunt, contra.

INDEX TO THE CASES.

Aiken, vs. Jones.	69	Marshall, ads. White,	122.
Barnes, & Co. vs. Shelton,	33.	Miller, vs. Langton,	131.
Bates, ads. Martin,	17.	Mitchell, vs. Parham & Davis,	3.
Brennan, & M'Creary vs. M'Le-		M'Mullin & wife, vs. Brown,	76.
more,	74.	Morrison, ads. Barksdale,	101.
Brown, vs. Fausett, & others,	81.	Moyer, vs. Folk & Folk,	50.
Calder, vs. Delessieline,	186.	Nicks, Adm'r. of Fair, vs. Martin-	
Carsten, vs. Murray,	113.	dale,	135.
Chappell & Cureton, vs. Proctor,	49.	Owens, vs. Ford,	25.
Croxton, & Co. vs. Addison,	72.	Price, ads. Justrobe,	111.
Dunn, vs. City Council of		Reed, vs. Price,	3.
Charleston,	189.	Rambert, ads. Kelly,	65.
Farrand, vs. Bouchell,	83.	Robinson & others, ads. Car-	
Gains, vs. Downs,	72.	wile,	35.
Gibson, ads. Chappell,	28.	Rogers, ads. Norton,	5.
Glenn, Trustee, vs. Lopez,	105.	Smith, vs. Goggans,	62.
Gray, ads. Young,	38.	State, vs. Council,	53.
Admr. of Happoldt, vs. Jones,	109.	—, vs. Harrison, }	82.
Haviss, vs. Barkley, Sheriff, .	63.	—, vs. Seaborn, }	90.
Holmes, vs. Hard,	123.	—, vs. Crosby,	139.
Hopkins, vs. Myers,	56.	—, vs. Huggins,	183.
Houston, vs. Frasier,	10.	—, vs. Larumbo,	59.
Jones, vs. Postell & Potter,	92.	—, vs. Petty,	201.
S. & I. Johnson, vs. Gaither,	6	Singleton, vs. Bremar, Adm'r. of	
Lahiffe, & Lahiffe, vs. Hunter,	184.	Bremar,	156.
Lester, ads. Martin,	17.	Stoney, vs. M'Niel,	26.
Long, vs. Kinard,	47.	Vaughn, & M'Lauchlin, ads.	9.
P. & M. Love, vs. Dennis,	70.	Dinkins,	17.
Lyles, Ex'r. of Sims, vs. Sims,	42.	Volentine, vs. Bladen,	144.
Lyles, Ordinary, vs. Brown,		Wadsworth, vs. Griswold,	45.
Adm'r. of Brown,	81.	Wallis, vs. Nelson,	
Magwood, ads. Legge, Adm'r.		Walker, vs. Harshaw,	
of Packrow,	116	C. & J. T. Weyman, Ex'r. & Ex'r.	
Mairs, & others, vs. Smith,	128.	of Gale, vs. Murdock, Ex'r.	
Malcomson, vs. James, Adm'r.		of Miller,	125.
of Ferrell,	7.	Wiggins, vs. Hunter,	50.

THOMAS DUGGAN, vs. ALEXANDER ENGLAND, Assignee of the Sheriff of Charleston District.

The act of 1808 provides, that the security given by plaintiff in replevin, shall be bound not only for the return of the goods, but for the rent due, and costs; and that the sheriff shall take bond, according to law, for a sufficient amount to cover the rent and costs.

The condition of the bond in this case, was to prosecute the suit with effect or return the goods or pay the value. Breach assigned, that the plaintiff in replevin had not prosecuted his suit to effect. On demurrer it was held that the breach assigned was insufficient; though the bond was not void.

On the return of elongata by the sheriff, to the writ de retorno habendo, the right of action accrues on the replevin bond, but fi fa, cannot be issued till a writ of enquiry executed.

THIS was an action on a replevin bond. The bond professed to be taken in pursuance of an act of the legislature, passed in the year 1808, 1st. Brevard 243, which contains the following provisions, "that from and after the passing of this act, the plaintiff or plaintiffs in all actions of replevin shall be bound to declare within one month from the lodgment of the writ in the sheriff's office, without any rule or notice for that purpose; and on failure of the sheriff to make return thereof within the period aforesaid, the plaintiff or plaintiffs are hereby authorized to substitute the same, as in case of loss; and in case the said plaintiff or plaintiffs shall not declare within the periods aforesaid, the defendant or defendants shall be at liberty to enter up judgment of non pros, and to proceed as in such case is provided by law." And "that in all cases of replevin, the security given by the plaintiff shall be bound and obliged, not only for the return of the goods distrained, but also, in case the said goods shall be insufficient to satisfy the rent for which the distress is made, or in case the same shall be eloigned, for the full amount of the rent for which the distress shall be made and all costs of suit, which may be adjudged against the plaintiff in the action; and it shall be the duty of the sheriff executing the writ of replevin to take bond and security according to law for such amount as shall be sufficient to cover all such sums."

The condition of the bond was in substance, that the plaintiff should prosecute his suit to effect, or on failure thereof,

DUGGAN, *vs.* ENGLAND.

should return the goods or pay the value thereof, if a return should be adjudged. The breach assigned was that the plaintiff in replevin, had not prosecuted his writ to effect. The defendant demurred to the declaration.

1st. It was contended that the bond was not taken according to the provisions of the act, inasmuch as it required the plaintiff to prosecute his suit with effect, which the act did not require, and that it was therefore void.

2d. If the bond was not void, still the security could not be liable, until a judgment was obtained against the principal in the replevin bond, and execution taken out against the goods. That the act made the security liable only on the failure of the plaintiff in replevin to return the goods or to pay the rent, &c. That the plaintiff in this action, therefore, had not set forth any cause of action. The demurrer was overruled and judgment given for the plaintiff. This was a motion to reverse that decision.

The opinion of the court was delivered by Mr. Justice Nott.

We have had no act of the legislature, in this state, regulating the proceedings in replevin, previous to the act of 1808. Our practice, however, has generally been conformable to the practice in England, under their statutes on that subject. But as few of those statutes have been made of force here, the construction of them could not be drawn into question, which has rendered our practice, as was observed in the argument, rather of an anomalous character. It has therefore been somewhat difficult hitherto, to ascertain with any degree of satisfaction, what the law was upon the subject; and although it appears to have been the object of the legislature, by the act above alluded to, to remove the difficulty and to render the proceedings more simple and uniform, yet I think it somewhat doubtful whether the object has been completely attained. I am disposed to think, however, that by looking to the spirit of the act, and giving it a liberal construction to meet the apparent intentions of the legislature, the principal difficulties may be surmounted.

DUGGAN, vs. ENGLAND.

The plaintiff in replevin is required, within one month after the lodgment of the writ in the sheriff's office, to file his declaration; which if he fail to do, the defendant may enter up judgment of non pros against him. It is made the duty of the sheriff, when he executes the writ, to take a bond *according to law*, for such amount as shall be sufficient to cover the rent due, and costs. The act does not give the form of a bond, it only declares the extent to which the security shall be liable. He is made liable "not only for the return of the goods distrained, but also, in case the said goods shall be insufficient to satisfy the rent for which the distress is made, or in case the same shall be eloigned, for the full amount of the rent &c. and costs of suit." The act does not like the English statute of Westminster the 2d. require the sheriff to take bond that the plaintiff shall prosecute his suit to effect, nor does it make the security liable in case he shall fail to do so. For although he may not have prosecuted his suit to effect, yet he may have returned the goods or paid the rent, and it is only on failure of having done so, after the suit is determined, that this liability is incurred. There is no breach assigned therefore for which the security is liable.

I do not think, however, that the bond is void, for requiring the plaintiff to prosecute his suit to effect. That is the object of the replevin, and it is a duty, which the law imposes upon him; and I think that taking the law as it before stood, together with the late act, the condition of the bond may be, 'that he shall prosecute his suit to effect, or on failure thereof, shall return the goods, &c.' in the words of the act. And although I do not think the bond in this case, so well drawn as it might have been, and recommend to the sheriff in future to pursue the words of the act more closely than he has in this instance, yet I think it is substantially correct. But the breach is not well assigned. The bond requires the obligor to prosecute his suit to effect and to return the property distrained, &c. It should have been *or* return the property. But taking the whole condition together, it will admit of that construction. It contains then an alternative condition, to prosecute the replevin to effect

DUGGAN, vs. ENGLAND.

or to return the goods distrained, &c. and when a person undertakes to perform one of two things, the party who would take advantage of the non-performance must aver that he has performed neither the one nor the other. *Burgess vs. Brazier*, 1st. Str. 594. *Penny vs. Porter*, 2d East, 2. In this case even tho' the obligor may not have prosecuted the suit to effect, he may have performed the other conditions; in which case, the liability of his security would not attach. The demurrer therefore ought to have been sustained, and the motion to reverse the decision below must be granted.

From this view of the case, it is not necessary to the present motion, that any opinion should be expressed on the second ground; but it may nevertheless be useful, as it regards the future practice in similar cases. The act authorizes the defendant in replevin, as soon as he has entered up his judgment of non pros, to proceed as in such cases is provided by law. He may therefore immediately issue a writ *de retorno habendo*, for the goods, 6 *Bacon Ab.* 66, *Title Replevin*, E. 4. It is also further provided, that the securities shall be liable for the whole amount of rent due, and costs of suit, in case the goods shall be eloigned or shall be insufficient to satisfy the amount. Immediately, therefore, upon the return of *elongata* by the sheriff, a right of action accrues upon the bond; but a *fi fa*, cannot be issued, until a writ of enquiry has been executed to ascertain the damages; 6 *Bacon, Ab.* 84, *Title Replevin*, L.

I have thus taken up the different parts of the act, and given them such construction as I think will in future render the proceedings under it, plain and intelligible; and although the demurrer must be supported in this case, yet if the plaintiff has a good cause of action, he may have leave to amend his declaration upon payment of costs so as to meet the justice of the case.

Bay, Colcock, Johnson & Huger, Justices, concurred.

Gadsden, for motion,

Gilchrist, contra.

JOHN H. SARGEANT, *vs.* S. HELMBOLD.

An action for slander cannot be instituted by process of attachment.

THE plaintiff in this case, had issued an attachment for slander. On the return of the writ, a motion was made before judge Bay, in Charleston, that it might be quashed, on the ground that an attachment would not lie in such case. The motion was granted, and the object of this motion was to reverse that order.

The opinion of the court was delivered by Mr. Justice Nott.

The process of attachment was not allowed at common law. Several acts of the legislature of this state have authorized it, in certain specified cases, where the ordinary process of law cannot be served. The first act on the subject, which was passed in the year 1744, *public laws* 187, embraces only cases arising upon contract. The act of 1783, *public laws* 315, extends it to torts; but it is only to torts, trespasses or injuries "actually done to property, real or personal." It does not include cases of slander, and we must not extend it by construction, beyond what the letter or spirit of the act will permit.

The motion therefore, must be refused.—*Bay, Colcock, Grant, Johnson and Huger*, Justices concurred.

Sargeant, for motion,
Echard, contra.

THOMAS BLACKWOOD and RICHARD BRENNAN, *ads.* JAMES LEMAN, SEN'R.

In an action for refusing to comply with the terms of a sale at auction, the jury may allow as damages, the difference between the sale and re-sale and interest thereon.

The auctioneer may be considered the agent of both parties and his entry a liquidation of the demand.

THIS was an action of *assumpsit*. The object of the suit was to recover the difference between the sale and re-sale of property sold at auction. The defendants were the purchasers at the first sale and had refused to comply with the terms of the

BLACKWOOD & BRENNAN, *ads.* LEMAN.

sale. The goods were, therefore, sold a second time at their risk. The jury found a verdict for the amount claimed, with interest, and this was a motion for a new trial, on the ground, that the plaintiff was not entitled to interest in a case of this description.

The opinion of the court, was delivered by Mr. Justice Nott.

It appears to be a much more difficult matter than one would imagine to lay down a rule by which it may be determined in what cases a person is, or is not entitled to recover interest. In the case of Godard and Bulow, 1 N. & M. 45 ———, the subject was pretty fully considered, and although there was some diversity of opinion among the judges at that time, I believe the rule there laid down has been acted upon ever since. The vendue act, under which this action is brought, 2d. Brevard, 325, subjects the purchaser to the payment of all damages which the seller may have sustained by the non-performance of the contract. The damages which he must be supposed to have sustained, ought, I think, to be at least the difference betwixt the two sales and the interest upon it. I have no doubt therefore but that the jury might have given damages to that amount, but whether they could give interest, *eo nomine*, is the question. It is therefore more a question of form than substance; and in such cases the court will not be very astute to enquire whether they cannot grant a new trial. But I do not think that even that difficulty stands in our way in this case. The vendue-master was the agent of both parties. His entry in his books, was a liquidation of the demand, and on that ground the plaintiff was entitled to interest.

The motion, therefore, must be refused.—*Colcock, Gantt and Johnson*, Justices, concurred.

THEODORE GOURDINE, ads. THE HEIRS OF JESSÉ BARINO.

Copies of grants and plats, certified by the deputy secretary of state and deputy surveyor-general, are admissible in evidence, without proof of the appointment of those deputies, or that they have in other instances acted in those capacities.

THIS was an action of trespass to try title. After the plaintiff had closed his case, the defendant offered in evidence the copies of a grant and plat older than those under which the plaintiff claimed. The first was certified by Samuel Burger, *deputy secretary of state*, in Charleston, the other by Thomas Willison, *deputy surveyor-general*, in Columbia. An objection was made to this evidence, on the ground, that it did not appear, that these persons had been regularly appointed to the offices which they respectively assumed, nor that they had been in the habit of performing the duties. On the other hand it was contended that the certificates themselves furnished all the evidence which was necessary of that fact. The presiding judge refused the evidence and the plaintiff obtained a verdict. This was a motion for a new trial, on the ground that the testimony ought to have been received.

Petigru, attorney-general, for the motion. There is a distinction between a public and a private authority. The appointment of a public officer need not be proved; it is a presumption of law that a person exercising a public office, is duly authorized. *Rex vs. Verelst*, 3 *Camp. Ni. Pri. Rep.* 332. Are these deputies public officers? They must be so considered, for the constitution of the state, (2 sec. 10 art.) provides for their appointment.

By the act of 1803, 2 *Faust*, 498, copies of plats and grants, certified by the secretary of state and surveyor-general, are made evidence. Whatever may be done by the principal, may be done by his deputy. 5 *Com. Dig. Tit. Officer*, D. 3.

It may be objected that there ought to be some other evidence of the exercise of a public office, than the single act which is to be authenticated. But in the case of *Rex vs. Jones*, 2 *Camp. Ni. Pri. Rep.* 131, the official character of a public officer was held to be sufficiently proved by a single letter. There could not be a stronger or more unequivocal official act than the certificates in question.

GOURDINE, *ads.* BARINO.

Dunkin, contra. The admission of copies of instruments in evidence, is a departure from the ordinary rules of law, and Courts will not go farther in admitting them, than they find themselves plainly warranted. The rule is conceded that the official character of a public officer, *whose appointment is public*, will be taken notice of. But the appointment of these deputies is the private and personal act of the secretary of state and surveyor general.

We concede too that the certificate of a deputy is good; but he must be proved to be a deputy. This might be shewn in two ways; either by direct proof of his appointment or that he had been in the habit of acting in that character. The reasoning is that the particular act of signing these certificates is sufficient proof of the character of the deputies. If so, any man might make plats and grants, and if signed by the names of John Doe and Richard Roe, they must be received in evidence. There would be no crime, according to our law, in signing a fictitious name, with the title of deputy secretary or deputy surveyor annexed. The signatures are not even proved to be the hand writing of the persons whose names they purport to be.

The opinion of the court was delivered by Mr. Justice Nott.

The constitution of this state requires the secretary of state and the surveyor-general to keep offices, both in Columbia and Charleston. They are authorized to keep a deputy at one office, while they perform the duties of the other themselves; the constitution itself therefore recognizes the deputies as public officers. The act of 1803, *2d Faust*, 498, authorizes the copies of grants and plats, certified by the secretary of state and surveyor-general to be received in evidence, where the originals are lost. This court has decided that copies of such records, certified by the deputies, come within the spirit, tho' not the letter of the act, and have permitted them to be given in evidence; and it appears necessary, from the very constitution of those offices, that the official acts of the deputies should be respected as of the same authority as those of their principals; and I think it very well settled, that the acts of public officers, purporting to be official,

GOURDINE, *ads.* BARINO.

ought to be regarded as such, without any evidence of their appointment; 3 *Campbell*, 33. 2nd. *Dallas*, 131.

It has, however, been contended, that as the appointment of deputies is by their principals, and held at their pleasure, it is not of such public notoriety as to give their acts a claim to such high respect; and I think the argument entitled to no little consideration. But when it is observed that the papers themselves, purport to be the copies of documents remaining of record, in a public office; and thereby furnish the means of detection, should any fraud or imposition exist, and as each furnishes evidence of the genuineness of the other, no danger or inconvenience can result from admitting them without further proof. On the other hand, great inconvenience would result from requiring evidence aliunde in every such case, an inconvenience which would increase with the lapse of time, until it might become impossible that any such could be produced. It is said, that the evidence which was offered, went rather to disprove that Burger was the deputy-secretary of state, because the witness said, he had known him act for the surveyor-general; but he did not know that he had acted as deputy-secretary. But it will be recollected, that the two offices are kept together, and the same person may act as deputy in both; proof of his being in possession of one, furnishes presumptive evidence that he may have performed the duties of the other. The certificate of Willison does not authorize a contrary inference, because he was in Columbia, and Burger in Charleston. I am of opinion, therefore, that the testimony ought to have been received and that a new trial should be granted.

Johnson, Gantt and Huger, Justices, concurred.

Petigru, for motion,

Dunham, contra.

J. PARRAVICENE, vs. GEO. E. SCHWART.

The Prison Bound's Act, only requires the defendant to surrender so much property, as shall be sufficient to satisfy the debt for which he is arrested. Whether the property be sufficient for that purpose, is a matter, in the first instance, for the determination of the judge. The judge may allow defendant's schedule to be amended, even after it is sworn to.

THIS was an application for the benefit of the prison bound's act. Defendant filed a schedule on the 2d August, 1823, with an oath, that it contained a full account of all his estate and effects; upon which the plaintiff was summoned to shew cause why he should not be discharged. On the 12th August, the parties appeared before judge Bay, and at the defendant's request, the cause was postponed to Friday 15th, to give him an opportunity to account for his having spent more than two shillings and six pence, per day, while in prison. On the 15th the plaintiff produced tax returns, showing that defendant's wife, before marriage, was interested in a considerable estate, which the defendant did not explain, and the judge granted the plaintiff till Tuesday, 19th August, to show why defendant should not be discharged. On the 19th August, the plaintiff produced the affidavit of Mr. Monpoe, in the following terms: "H. Monpoe, swears that he knows a boy, Hercules, who was in the possession of George E. Schwart, before he went to gaol lately, believes he is his property, and that he acquired him by his intermarriage with Ann Wilkinson, otherwise called Ann Lloyd." The defendant's schedule made no mention of this or any other negro, or any property but wearing apparel.

Plaintiff then insisted, that as he had shewn cause to disbelieve the defendant's oath, he ought not to be discharged. The defendant neither admitted nor denied Mr. Monpoe's statement, but offered to assign his right to the boy Hercules, without any explanation however of his right, or accounting for the omission of the negro in his schedule. The plaintiff insisted on a jury, or to be allowed to examine witnesses before the judge, to ascertain whether the oath of defendant was true; but the presiding judge refused it, because he said the defendant had a right to amend, and directed him to do so. The plaintiff then offered to interrogate the defendant, and proposed to

PARRAVICENE, vs. SCHWART.

ask him, where the boy Hercules was, and what title he had to him, but the presiding judge refused to allow any question to be asked and ordered the defendant to be discharged. From this order, the plaintiff appeals for the following, among other reasons:

1st. Because the presiding judge refused to allow the plaintiff to prove that the defendant, Schwart, had rendered a false and fraudulent schedule.

2nd. Because the presiding judge discharged the defendant, after the plaintiff had shown, in the language of the act, that the oath which he had taken ought not to be believed.

3d. Because the presiding judge refused to let the plaintiff interrogate the defendant, in order to know where the negro Hercules was to be found, or how the plaintiff was to obtain possession of him.

The opinion of the court, was delivered by Mr. Justice Nott.

This was an application for the benefit of the act commonly called the *prison bound's act*, and not of the act, *for the relief of insolvent debtors*; and although the objects of the two acts, are in general distinct, the seventh clause of the prison bound's act, has been held to apply equally to persons applying for the benefit of the other. But in the construction of it, we must nevertheless have regard to the nature of the application. The prison bound's act, requires the defendant only to deliver up property enough to satisfy the debt for which he is confined. If therefore, he surrenders enough for that purpose, the judge to whom the application is made is not bound to prosecute his enquiries any further. The object of the act, as well as the object of both parties is satisfied, and whether the property surrendered be sufficient or not, must always be referred, in the first instance, to the discretion of the judge.

In the case now under consideration, the judge reports to us that the property surrendered was amply sufficient, independent of the negro boy Hercules. It is true, the judge may sometimes be deceived; but a discharge from imprisonment is not a discharge of the debt. If the property mentioned in the

DELIESSELINÉ, *ads.* BUNCH.

schedule, is not sufficient; any other property that the defendant has at the time, or any that he may afterwards acquire, will still be liable, and if the schedule be false, he may be arrested again on the same execution. If the property surrendered, should not appear to be sufficient, and it be suggested that the schedule is false, I think the case ought to be referred to a jury. I have no doubt, however, but that the judge may suffer the schedule to be amended, and if it shall appear that the property was not kept back with any fraudulent view, that the person may be discharged.

It appears to have been the intention of the act, to allow a considerable latitude of discretion in the judge to whom the application is made; and, I think, it ought to be liberally exercised in favor of liberty. I am of opinion, therefore, without going into an examination of the several grounds made in the brief, separately, that the motion ought to be refused.

Colcock, Johnson and Huger, Justices, concurred,

Petigru, for motion,

Hunt, contra.



FRANCIS G. DELIESSELINÉ, *sheriff of Charleston district, ads.*
L. BUNCH.

In an action against the sheriff, for the mis-feazance of his deputy, the admission of the sheriff is sufficient evidence of the deputation; it is not necessary to prove a written deputation or special warrant.

A deputy sheriff, executing process, is authorized to take bail.

Sheriff taking bail bond, without seals annexed to the names of the sureties, and afterwards detaining the person arrested, and demanding money for fees, was held not justified in the detention, by the informality of the bond.

THIS was an action brought by the plaintiff, against the sheriff, for false imprisonment, by his deputy, Singletary.

The evidence adduced, was as follows: Mr. M'Cants swore, that the witness and plaintiff were arrested by John I. Singletary, on a *capias ad respondendum*, with an order for bail.

DELIESSELINE, *ads.* BUNCH.

That they went before esquire, to execute the bond, which was done, as he supposed, correctly. He stated that Singletary put the bond in his pocket and demanded certain fees of office, which he and the plaintiff refused to pay. Singletary then took the bond out of his pocket and said that it was not properly executed, and that he would not discharge them, as there were no seals to the sureties names and they had not justified. He did not detain plaintiff long in custody, and did not bring her to town. On his cross-examination, he admitted that the bond was not completed, when Singletary refused to discharge plaintiff, and bail had not justified. There were no seals to the names of the Dehays, the sureties. When witness came down with Singletary to sheriff's office, Singletary immediately said to the sheriff, the bond is not properly executed, but it is not my fault; witness stated that the only reason why he supposed Singletary was the sheriff's deputy, was that Singletary said, when witness was brought to the office, he had brought these men to town, and produced the bond. The sheriff said, "it is not possible you have done so;" "why the Dehays are good men." The impression on his mind, was, that he was Mr. Deliesseline's deputy. Witness said he hoped the sheriff had brought him as a prisoner. The sheriff immediately discharged witness. He did not speak of Singletary as his general deputy. He did not say that Singletary was his officer, but witness inferred it.

Benjamin Dehay, another witness, says, that he was at plaintiff's house. Saunders, the justice of the peace, was there to see the bond executed. Witness was a surety; after it was executed, Singletary took it out of his pocket; he does not recollect any conversation before his brother signed, about his being worth the amount for which he became bail; he heard a dispute about fees, he then went off.

Andrew Dehay, another witness, swore he was there, signed the bond, does not recollect that it had any seals to it; Singletary demanded no fees of Mrs. Bunch, the plaintiff, while he remained. Here the evidence on the part of the plaintiff closed.

DELIESSELINE, *ads.* BUNCH.

Defendant demanded a non-suit on the following ground, That in this case it was not enough to prove Singletary a general bailiff, but that the privity between him and defendant, ought to have been established in the particular transaction, by proving the original warrant of execution directed by him to his bailiff; or, at least, the plaintiff ought to prove notice to produce it, so as to let in secondary evidence of its contents. The presiding judge refused the non-suit.

Defendant then examined F. A. Deliesseline, who produced the bond, which was admitted by M'Cants to be the bond taken by Singletary, and which wanted the seals to the names of the sureties, and which the sheriff had given to M'Cants, to carry into the country and have perfected; which had been done, and returned by M'Cants, in a letter to the sheriff, in which he says he is determined to have redress for the injury of the deputy.

The presiding judge charged the jury, that as to the liability of the sheriff for the act of his deputy, the law is, that it must appear that the deputy is acting in the character of deputy. In ordinary cases, the warrant or authority ought to be produced; but it depends on the view the jury takes of the facts whether this rule was complied with. The admission of the sheriff is the very highest authority, better than the warrant. The liability of the officer, is founded in public policy; it is *stricti juris*, and the strict rules of law ought to be applied in his favor. He did not think this public officer could take the ground that the bond was insufficient; but if the plaintiff was detained on that account, a verdict, even if the deputy had a bad motive, might be found for the defendant.

Verdict for the plaintiff.

A new trial was moved for, on the following grounds; and likewise for leave to enter a non-suit.

1st. That the presiding judge ought to have granted the motion for a non-suit, the plaintiff not having proved the authority from defendant to his deputy, in the particular case, by producing the capias and the authority under which it was pretended he acted.

DELIESSELINE, *ads.* BUNCH.

2nd. That the jury found against evidence and the direction of the presiding judge; as there was evidence that the bond was not executed according to law; that the deputy asserted, among other reasons, for the imprisonment of plaintiff, before he detained her, that the bond was not completed, and the presiding judge charged them, that if even the officer had a bad motive, still if he detained her because of the deficiency of the bond, it would be a good defence for the sheriff.

3d. That the sheriff had a right to have the defendant brought to his office to receive bail, and the deputy had no right to take bail, unless by special authority, which was not proved to have been given in this case.

4th. That it was immaterial what were the pretences of the deputy, the bond not being duly executed; the process being a *capias ad respondendum*, the sheriff had a right to the custody of plaintiff's person, and therefore could not be charged with false imprisonment.

5th That at the period when the false imprisonment, if any, commenced, the deputy had executed the mandate of the sheriff, and the subsequent conduct of the deputy was his private, and not official act, and therefore, the sheriff was not liable by virtue of his office.

Kennedy, for the motion. The office of sheriff is one of great responsibility, and he ought to be protected by the court, unless a liability has been clearly incurred. Especially in such a case as this, where the act has been done by one pretending to act under his authority, the strictest proof of the authority, should be required.

In order to charge the sheriff for the act of his deputy, it is incumbent on the plaintiff to produce the warrant under which the deputy acted. *Peake Ev.* 440; 7 *T. R.* 113.

The bond wanted the seals of the sureties, and was therefore incomplete; until the bond was made perfect, the officer had a right to detain the party arrested. *Jacob Law Dic.*

The office of a deputy in this country, corresponds with that of a bailiff in England. A bailiff cannot take bail, without a special warrant. 20 *Vin. Ab.* 500, *Tit. Trespass.*

DELIESSELINE, *ads.* BUNCH.

By the act of 1809, 1 Brev. Dig. 54, 5, bail to the sheriff is special bail; the taking of which is a judicial act, which the sheriff must execute in person; he cannot delegate this authority. The deputy was therefore justified in bringing plaintiff to the sheriff's office, in order to the giving of the bond. 2 *Johns. Rep.* 50; 2 *Wash. Rep.* 126.

The deputy had arrested the plaintiff and taken the bond, and was *functus officio*; the re-capture, was an act of his own, for which the sheriff is not responsible. It is like the case of a supersedeas, where the deputy is alone liable, if he does an act contrary to its tenor. 2 *Roll.* 552; 20 *Viner*, 418; *Cro. Eliz.* 918; *Cro. Jac.* 379; 4 *John. Rep.* 32.

Hunt, contra. Singletary was the general deputy of defendant, he had the writ in his hands, he brought the plaintiff and delivered her to the sheriff, who did not disavow his act. Here is an end then to the pretence that Singletary was not authorized by defendant.

The defendant may take either alternative, that the deputy had or had not the power to take the bail. If he had the power and abused it, the sheriff is liable: If he had not, then it was the duty of the sheriff to have gone in person. He ought to accept bail wherever it is tendered, and not to drag the citizens over the country for the purpose of attending his person. He had no right to send out his retainers and bring them bound into his office.

It is a mere pretext that the bond was not formally executed; the whole object of detaining the plaintiff was to extort money from her. There was nothing like a discharge and re-capture, it was one continued act. The deputy acted throughout, under the *capias*, and the detention was *colore officii*.

It is not denied that strict proof is necessary to shew that Singletary acted under the authority of the sheriff. But it does not appear that any better than that which was offered (the admission of defendant) ever existed. It was all plaintiff could produce and all that was necessary.

Delicsseline, in reply. This is a hard action, and the proof ought to be strict. Proof that Singletary was the general

DELESSELINE, *ads.* BUNCH.

deputy, is not enough; the special warrant ought to have been produced, and in the absence of that proof, a nonsuit ought to have been ordered. 7 T. R. 113. The only proof in the case was mere inference from a loose admission of the sheriff.

The sheriff is required by law to keep his office in Charleston, and he is entitled to reasonable time for enquiring into the sufficiency of the bail tendered. He must of necessity execute process by his deputies, and to enable him to judge of the sufficiency of the bail, the person arrested must be brought to his office, with the bail.

The opinion of the court was delivered by Mr. Justice Colcock.

The motion for a non-suit cannot prevail: there was sufficient evidence to prove that Singletary was acting in the capacity of deputy sheriff. The sheriff did not say so, in so many words, but his acts leave no doubt on the subject: he reproved him for having done wrong; told the witness, M'Cants, that he was at liberty; gave him the bail bond to be completed, which he carried with him and after putting the [L. S.] to the names, as he had been desired to do, sent it to the sheriff in a letter, who produced it, together with the letter on the trial.

On the third ground—it has been the invariable practice in this country to authorize the deputy sheriff's to take bail; it is indispensably necessary that it should be so. To bring every man to Charleston, against whom an order for bail might issue, would be to enable a malicious creditor unjustly to harrass his debtor, and in any view, to subject unfortunate debtors to unnecessary expense and trouble. The defendant cannot succeed on the fifth ground; for the misconduct of the deputy was attempted to be justified by the very fact that his duty had not been completely performed. He must be considered as acting in his official capacity. It is not like the case of Stevens and

for there the defendant had been taken from the deputy, his authority was superseded, and he, in opposition to the order of the judge to release the prisoner, continued to detain him in his custody. On the grounds of fact, the most

GOURDINE, vs. FLUDD.

favorable view of the case, was submitted to the jury, and they were given to understand that the court thought nominal damages would be sufficient; but they chose to differ from the court, as they had a right to do, and we cannot disturb the verdict.

Bay, Nott, Johnson & Huger, Justices, concurred.

Kennedy & De Lessieline, for the motion.

Hunt, contra.



THEODORE GOURDINE, vs. DANIEL FLUDD.

Action of debt, on bond given for land. Defence, title not in plaintiff and unsatisfied judgments against him, at the time of sale.

Held that proof of a third person, whose descendants are living, having been many years ago in possession of the land, long enough to acquire a title by the statute of limitations, without shewing the extent of such possession or claim, was not sufficient to establish the defence.

Defendant having since his purchase been in possession long enough to acquire a title by the statute, could not avail himself of such defence.

Unsatisfied judgments against plaintiff at the time of sale, did not constitute such a defect of title as would be a defence to the action.

THIS was an action of debt on two bonds of \$3200, given for the Eutaw tract of land.

Defence—1st. Fee-simple not in plaintiff when he sold.

2nd. Outstanding judgments.

For the defendant, it was proved that many years ago one Margaret M'Kelvey, whose descendants are living, was in possession of the land for ten or fifteen years, and that after her death, persons claiming under her were in possession. But the extent of their possession or claim was not shewn.

A deed from plaintiff to defendant, for two hundred and eight acres, (the land in question) dated the 23d of 1817; was introduced in reply; and it was admitted that defendant had been in uninterrupted possession ever since his purchase.

It appeared that there were unsatisfied judgments against the plaintiff at the time of the sale.

GOURDINE, vs. FLUDD.

On this evidence, under the charge of the presiding judge, the jury found a verdict for the plaintiff.

A new trial was moved for,

1st. Because the possession of Margaret M-Kelvey and those claiming under her, was sufficient to prove a title in her heirs, and no other or better title being proved, it was *prima facie* evidence of a title in them.

2nd. Because a grant must have existed, to vest a title in Gourdine, and therefore, it was not necessary to prove a grant, but only such possession as would, with a grant, establish a title other than in the plaintiff.

3rd. Because unsatisfied judgments against the seller of land are such incumbrances as ought, under the equity of the rule, to operate against the recovery of a bond given for lands thus incumbered.

The opinion of the court was delivered by Mr. Justice Colcock.

We have determined that in an action to recover a bond given for land, proof of an outstanding paramount title is a good defence, either in part or for the whole. But he who sets up the defence must, as in all other cases, prove it. Here an attempt was made to prove a title by possession, and if the evidence given were sufficient for that purpose, the tenure by which we hold land would be precarious indeed. An adverse possession of land for five years gives a title to the occupant for so much as he has the actual possession of, or for so much as he claims by distinctly marked boundaries. Now the evidence offered did not prove any acts of ownership, no cultivation of any particular part, it did not even fix the spot on which the occupant lived, whether on the north or south side of the tract. But above all, there was no evidence of the extent of her claim. Supposing then that the mere squatting on land is to be considered as an evidence of claim, what did she claim? Surely not the whole tract. The possession of a part is not a possession of the whole without some evidence of the extent of the claim. It is unnecessary to expend more time in showing that the others, claiming under her, could have no

GOURDINE, vs. FLUDD.

title. Even if she had a title however, the statute of limitations would bar her descendants, for they have been out of possession for thirty odd years. There was then no outstanding title proved.

But this is not all; the defendant has been in possession upwards of five years under a conveyance from the plaintiff, cultivating the greater part of the tract, which is a good title against all the world.

As to the last ground, this court cannot determine that judgments which appear unsatisfied on the records, are in fact due. It is well known that the reverse is often the case. In determining one issue, shall they try twenty? But there is another objection to this: is the court to do that for the purchaser which he might have done for himself, and that which in fact they will presume he did? He no doubt ascertained all this himself and made himself secure by a warranty. But in the case of *McRa vs. Smith*, 2 Bay 339, the court decided that possessory rights are good against grants, absolute conveyances, and judgments and executions. So also in the case of *Chollet vs. Hart*, 2 Bay, 156. The defendant having been five years in possession, no judgment creditor of the plaintiff can disturb his right.

Motion, dismissed.—*Bay, Nott, Johnson & Huger, Justices*, concurred.

Gantt, Justice, dubitante.

THE UNION INSURANCE COMPANY, *ads.* JOHN STONEY.
Insurance on a vessel "at and from Charleston to Marseilles, and at and from thence to Havanna." A separate policy on the cargo, executed the same day "from the loading thereof at Charleston." In the offer of plaintiffs, on which both policies were effected, every material circumstance was said to be disclosed. In fact the vessel had been laden at Havanna, and had touched at Charleston; the goods were not landed in Charleston, and the manifest shewed that they were shipped in the names of Spaniards. Held that the omission to disclose these facts, (Spain and her colonies being at war,) was such a concealment of material circumstances, as vitiated the policy of the vessel.

THIS was a policy of insurance on the schooner John "at and from Charleston to Marseilles, and at and from thence to Havanna." The schooner was lost on her voyage from Marseilles to the Havanna.

When the policy was entered into, the vessel was lying at Charleston, and it was made upon the offer of the plaintiff, dated August 12th 1818, for insurance of the vessel and her cargo; in which the plaintiff stated that the vessel was safe at Charleston, and without intimating that the voyage had already commenced from another port, makes this memorandum, "that every circumstance material for the underwriters to know, so as to form a just opinion of the above risk, was disclosed in the above offer."

On this offer, two policies were signed by the defendants. The policy on the vessel is in the form usual in cases of voyages to be commenced; and that on the goods, at the same date and upon the same offer, contains these words, "beginning the adventure upon the said lawful goods and merchandize, from and immediately after the loading thereof, on board of the said vessel at Charleston aforesaid."

It was admitted and even shewn by the plaintiff, under the affidavit of De La Cruz, that the vessel was chartered at the Havanna, to sail to Marseilles, to touch at Charleston for a Mediterranean pass, and that the goods were laden at Havanna, and that the manifest delivered to the Custom-House officer, set forth the names of certain Spanish merchants as the owners. But all these facts were unknown to the underwriters.

INSURANCE COMPANY, *ads* STOEY.

and concealed from them, and were not discovered until the claim was put in.

The defendants rested their defence on the following grounds:

1st. That the policy on the vessel had never attached, as the voyage sailed on was from Havannah to Marseilles, whilst the one insured was from Charleston to Marseilles.

2nd. That there was misrepresentation and a material concealment, in not disclosing the previous commencement of the voyage and the loading.

It fully appeared in the course of the trial, that all the schooner's papers shewed the voyage to be from Havanna to Marseilles, and that the vessel neither entered at nor cleared from the port of Charleston. The manifest shewed the goods to be shipped by Spanish owners, and although it was stated that the course of trade required this, and that the true owner might have been American, yet this was not shewn, and this fact, and that of her sailing from Havanna, subjected the vessel to detention by patriot privateers. It was also proved by the defendants that the premium taken was on the neutral risk from Charleston to Marseilles, and that had the true risk been disclosed, the premium would have been higher. The witnesses for the defendants were of opinion that these facts were not to be inquired into by the underwriters, who were to be governed by the plaintiff's own statement solely, as contained in his offer.

The presiding judge charged the jury in favor of the defendant's on both the grounds; as there was a breach of the warranty of a voyage to be commenced at Charleston, and a concealment of material facts, which ought to have been expressly disclosed by the plaintiff. The jury nevertheless found a verdict for the plaintiff, from which the defendants appealed and moved for a new trial or non-suit on the following grounds:

1st. That the policy never attached or was vacated, as the voyage described in the offer and covered by the policy was to commence at Charleston, on a vessel to be loaded there; whereas from the proof it appeared that the voyage had commenced at the Havanna, where the vessel was in fact loaded.

INSURANCE COMPANY, *ads.* STONEY.

2nd. That the policy was vacated by material misrepresentations and concealment, especially in relation to the material facts, that the vessel had commenced her voyage from a belligerent port, that she had belligerent property on board, that she was chartered at the Havanna, that the shippers were Spanish merchants, and that she was accompanied by documents which might have subjected her to capture or detention by patriot privateers, especially as there was no proof that either vessel or goods were American.

3rd. Because the verdict of the jury was contrary to the charge of the presiding judge, on the law embraced in the first ground. The presiding judge expressly charged that the policy was void; that the voyage described on its face, and in its body, and which was therefore warranted, was not accurately set forth as a voyage previously commenced; that it ought to have been so, agreeably to law and agreeably to usage, and therefore the voyage, in the course of which the vessel was lost, was different from the one described in the policy, and that therefore they must find for the defendants.

4th. Because the verdict of the jury was contrary to law and evidence, and the charge of the presiding judge on that evidence. The evidence of the policy on the ship, and of the offer, especially if taken in connexion with the policy on the goods, which the judge considered inseparable, shewed an entire omission or concealment of the true commencement of the voyage and of the previous loading of the cargo; yet the jury found a verdict on the presumption, or the possibility of this knowledge having come to the underwriters, although instructed by the court that the general rule of law required all this to have been expressly revealed by the insured, and that in an especial manner he was bound to do so, because of the express declaration in his offer, "that every material fact had been disclosed by him to the underwriters;" an averment which (if there would otherwise have been any propriety in their enquiring further,) confined the underwriters to the information contained in it, and fully authorized them to rely solely and exclusively on it.

INSURANCE COMPANY, *ads.* STONEY.

5th. Because in other respects the verdict of the jury was contrary to law and evidence.

Toomer, for the motion. There is no dispute, about the fact that the cargo of the *John* was put on board at Havanna, and it is proved that the offer is precisely that which would have been made, if the cargo had been put on board at Charleston, and the question is, whether this was not such a misrepresentation or concealment as vitiated the policy. The same offer contains proposals for insuring the cargo as well as the vessel. The policies are separate, but were both executed on the same day, and the whole ought to be taken as one entire contract. The policy on the goods expresses that the risk commenced from the lading, evidently shewing the understanding that the cargo was not then on board.

Every circumstance necessary to enable the underwriters to form a just estimate of the risk and premium must be disclosed; the time of departure, the termination of the voyage, the time when the risk is to commence, whether at the beginning or middle of the voyage, &c. Any misrepresentation or concealment on a material point will vitiate the policy. 1 *Marshall*, 321, 2, 454, 463, 4, 5, 7; 1 *Park*, 319, 331.

The words "at and from," imply the commencement of a voyage, and if the voyage be commenced and the fact be not stated, it will vacate the policy. 1 *Blac. Rep.* 463; 1 *Marshall*, 322. This voyage did commence at Havanna, and the fact was not disclosed.

The evidence was, that the ship's having cleared out from Havanna would have increased the rate of insurance. Spain and her colonies were then at war, and her having cleared out from that port subjected her to detention or condemnation.

From the manifest entered in the Custom-House it appears that the goods belonged to Spanish merchants, and were therefore belligerent property, which increased the risk. With respect to these circumstances, the misrepresentation or concealment was very material.

If the policy contains a warranty, it is wholly immaterial whether it relate to a material risk or not, if it be untrue it

INSURANCE COMPANY, *ads.* STONEY.

vitiates the policy. 1 *Marshall* 348; 1 *T. R.* 343. The policy, according to our construction, contained a warranty that the voyage was to commence at Charleston, when in fact it had commenced at Havanna. If a policy be executed on the ship and cargo, to commence from the lading thereof, and the goods were before on board, the policy never attaches on the goods or the ship. 1 *Marshall*, 461; 4 *East*, 130.

The offer for insurance on the vessel is "at and from Charleston to Marseilles, and thence back to Havanna," and it was insisted that the word *back*, imports that the vessel had sailed from Havanna. This conclusion seems to be groundless. In common parlance, *back* implies a return either to the place of departure or to some other place in the course of the outward voyage.

Hunt, contra. The case from 1 *Blac. Rep.* 463, is not analogous to the present. The insurance there was on perishable goods, and the vessel had lain by for six months at Genoa, and the court proceeded on the ground that it was impossible to know whether the injury sustained arose from causes prior or subsequent to the insurance. In the case from 4 *East*, the only principle decided was, that where the occurrence from which the risk was to commence never happens, the policy never attaches. The insurance in this case was on the voyage of the vessel; she did sail on the voyage and the policy attached. That was the occurrence on which it was to attach.

Whatever may be the general meaning of the term voyage, when it is applied to a vessel insured, it must of necessity mean from the place where the risk is to commence to that of its termination. Voyage means the passage of a vessel from one port or place to another. 1 *Marshall*, 180.

"At and from" must be taken according to the subject matter of the policy. It is not necessary to shew that the voyage had not commenced; it is sufficient to shew that the ship is in port at the time, if the risk is to commence there. 1 *Caines* 75, 79; 2 *Cases in error*, 158. There is nothing in the policy to shew that the goods were to be shipped in Charleston. It was proved that the goods were American and not Spanish, it was

INSURANCE COMPANY, *ads.* STONEY.

necessary to ship them as belonging to Spaniards, because Americans cannot ship goods at Havanna in their own names. They were consigned to merchants in France, and goods always belong to the consignee.

There could not have been any concealment or misrepresentation, because the arrival of the vessel from Havanna was published in the news-papers and she was actually registered in the insurance office. Concealment must be of something not known to the underwriters. 3 *Burr*, 1905.

In effecting insurance, it is not necessary to disclose the nature of the trade, in which the vessel is engaged; at any rate, provided the trade be lawful. Carrying belligerent property does not vitiate the policy. *Lex. Mer. Amer.* 304.

Nothing can be a warranty, but what is written on the policy. Leaving her manifest at the Custom-House and taking a Mediterranean pass was an entry and clearance.

Prioleau, in reply. The voyage insured never commenced; it was at and from Charleston, and according to the policy on the goods, before the goods were put on board. The terms of the offer, as interpreted by intelligent witnesses, are those which would be used for a vessel to be loaded in Charleston, and to judge from the offer alone, that would be the conclusion. The rate of insurance is also calculated on this state of facts; to cover the war risk, the premium was proved to be greater. None but Spaniards are permitted to trade from Havanna, and if it had been known that the goods shipped were Spanish, the rate of insurance would have been double. In point of fact, the voyage commenced at Havanna and was to terminate at Marseilles, and the whole object of coming here was to procure a Mediterranean pass.

If the cargo had been discharged here and the vessel reloaded, then the voyage would have commenced here. For the meaning of the words "at and from," see 1 *Marshall*, 473, n. 4 *East*, 130; 2 *Taunt*, 416; 4 *Taunt*, 628; 15 *East*, 46; 2 *Maul & Selw.* 106.

The omission to disclose the slightest material circumstance, will vitiate the policy; even a loose rumor of the loss of a vessel

INSURANCE COMPANY, *ads.* STONEY.

ought to be made known. Sailing from a belligerent port increases the risk and ought to be disclosed. Where there are several policies on the same voyage, and there is a concealment of material circumstances relating to one, the whole are void. 1 *Marshall*, 326; *Id.* 473, *b.* 1 *Park*, 287; *Wharton's Dig.* 319.

Here was not only a concealment of material circumstances, but a misrepresentation: 1st. The fact that the voyage commenced at Havanna; 2d. That she was chartered by, and laden with the goods of Spaniards; 3d. That her papers were Spanish; 4th. That she was loaded before the policy. All these facts were material to enable the underwriters to form a just estimate. Spain and her colonies were at war. Admit that the goods were American property, yet her having cleared out from Havanna, subjected her to capture and condemnation.

If the cargo had been discharged here and reloaded, and the vessel had cleared out from this port, she would not have been liable to capture. 16 *East*, 187. It was to this state of things the policy was to attach.

The opinion of the court, was delivered by Mr. Justice Colcock.

I shall consider the second ground taken in the brief, first.

A full and fair disclosure of all the circumstances relating to the intended voyage, which may in any degree influence the determination of the underwriters in undertaking the risk or estimating the premium, should be made known to the underwriters; and a concealment which is only the effect of accident, negligence, inadvertence or mistake, will, if material, be equally fatal to the contract as if it were intentional and fraudulent.

The law being thus stated, I will enquire, 1st. Whether there was a concealment of a fact; if so, 2d. Whether it was a material fact; and 3d. Whether it was of that character which underwriters are bound to know or abide the consequences resulting.

That there was a concealment, we need only look to facts disclosed and the offer. The ship had been loaded at the Havanna; she was lying in the stream here; yet this was not stated in the offer, which professes to disclose every circumstance necessary for the underwriters to know.. Every witness

INSURANCE COMPANY, *ads.* STONEY.

called on the part of the defendant stated that it was a material fact, for that the having been loaded at the Havanna, and her cargo being in appearance at least Spanish property, would under the existing state of things, subject her to the capture and detention of the patriot privateers; and one witness expressly said, that to his knowledge, such privateers were cruising in the Mediterranean sea at the very time that this vessel passed; all agreed too, that the premium would necessarily have been increased. The Spanish provinces had thrown off their allegiance to the mother country; war actually existed between them. The Havanna was therefore to all intents and purposes a belligerent port. Under these circumstances, a Mediterranean pass would not have secured the vessel against the patriot privateers, had they fallen in with her.

But it is said that if the fact were material, it is of that character which the underwriters are bound to know, and therefore need not have been disclosed. The slightest examination of the subject, will shew that this is incorrect. The underwriter needs not be told what *lessens* the risk agreed upon, or is understood to be comprised within the express terms of the policy; he needs not be told what is the result of political speculations or general intelligence; he is bound to know every cause which may occasion natural perils; as the difficulty of the voyage, the variations of the heavens, the probability of lightning, hurricanes, &c. &c." 1st. *Marshall*, p. 473, all of which are of a general or public nature: but a particular fact, relating alone to the vessel to be insured, although of such a description as may come to the knowledge of the underwriters, is not such a fact as they are bound to know.

Again, it is said they must have known it, for their inspector saw the vessel, and she was announced in the news-papers as having arrived from the Havanna. Now neither of these circumstances prove that they did know it; for as to the inspector, he expressly said he did not communicate it; and as to the news papers, although her arrival was announced, it was not said she was loaded. But suppose the fact to have been known to the insurers, it is still a misrepresentation on the part of the insured.

INSURANCE COMPANY, *ads.* STONEY.

What is meant by an offer declaring that all material circumstances are disclosed? Why, it amounts to this! you need not enquire (as is your usual custom) into any matter relating to this vessel; you need not believe any thing you hear in relation to her, for we have told you the whole truth. How does it comport with this, for these very persons to say, 'but you did know, or should have known that we did not tell the truth.' Again, suppose the underwriters could have been induced to believe the fact, that she was loaded and had been loaded at the Havana, may they not rationally have concluded that the insured meant to enter the vessel, discharge a part of the cargo, re-ship it and take a regular clearance; thus making out the very risk insured; making it a voyage to commence here; making it in fact, the case stated in the offer. They certainly had a right to come to such a conclusion; for none other could have excused the conduct of the insured. And I have no doubt that this was the truth of the case, that such was the intention of the insured when the offer was made; but that some after considerations induced him to pursue another course; perhaps the expenses attendant on it, or some information which may have induced him to believe that the Mediterranean pass would be sufficient protection to the vessel.

It is contended however, that all this was matter for the consideration of the jury, and that the verdict ought not therefore to be disturbed. So much has been said in various cases by this court on that subject, that it is unnecessary now to enter into it. It is sufficient to remark, that when a verdict is clearly against evidence, it is the duty of the court to interpose, and that such is the case before us is sufficiently shewn. A new trial is therefore ordered on this ground.

On the first ground in the brief, that the voyage performed was not the voyage insured, or in other words that there was a breach of warranty, the court give no opinion. I am however individually, as well satisfied that there should be a new trial on this ground as on the ground of concealment. In *1st. Marshall* 348, it is said, the breach of a warranty consists either in the falsehood of an affirmation or the non-performance of any

INSURANCE COMPANY, *ads.* STONEY.

executory stipulation; in either case, the contract is void ab initio, the warranty being a condition precedent; and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misfortune or any other cause, the consequence is the same. The warranty makes the contract hypothetical; that is, it shall be binding if the warranty be complied with. With respect to the compliance with warranties, there is no latitude, there is no equity. The only question is, has the thing warranted taken place or not. If not, the insurer is not answerable for any loss, even though it did not happen in consequence of the breach of warranty.—The testimony proved clearly that the words “at and from” in this policy, must mean the *terminus a quo* of the voyage; that the vessel was receiving her cargo here and was to sail from this to Marseilles. Every witness who gave an opinion on the offer, said it was in the form and language of a ship commencing her voyage here. What is the language of the policy on the goods? “Loading at Charleston”—and how is it possible to separate the policies? they were entered into at the same time, by the same parties; goods and vessel both destined to the same point; how is it possible that the fact of departure can be true as to one and false as to the other? how can it be said this was the loading port as to the goods but not as to the ship? nor can the case in my opinion be distinguished as to principle, from the case of *Robertson & Thompson, vs. French*. 4 *East* p. 130, It is unnecessary at present to take any further view of the question.

The motion is granted.—*Bay, Nott, Johnson & Huger*, Justices, concurred.

Toomer & Prioleau, for motion.

Hunt, contra

THE UNION BANK, vs. GEORGE & WILLIAM HALL.

The holder of a promissory note, accepting a dividend of an insolvent drawer's effects and releasing him with the consent of the endorsers, does not thereby discharge the endorsers.

The firm having endorsed a note, one of the partners may, after dissolution, consent to the holder's compounding with, and releasing the drawer, and his consent will bind the other partner to be answerable for the balance due.

THE defendants George Hall and William Hall, trading at the time under the firm of George Hall and company, endorsed the note of one Andrew Moffett, for \$270, and it was discounted with the plaintiffs for his benefit. Before it became due, he stopped payment and executed an assignment of all his effects, for the benefit of such of his creditors as should, within three months, accept their proportion under the assignment and give him a full discharge. Soon after and before the note fell due, the defendants also failed, their copartnership was dissolved and they assigned their property for the benefit of their creditors. The note at maturity being unpaid, was duly protested against the drawer and endorsers, and was placed in suit against the defendants, of whom William Hall was held to bail.

After he had been held to bail, William Hall called at the bank and recommended to them to avail themselves of Mr. Moffett's assignment, as the only probable means of securing any part of the debt, saying that the assets of George Hall and company would not be sufficient to pay their own debts, and that if the suit against him was continued, it would only tend to his embarrassment, without any benefit accruing to the bank. No evidence was offered to shew that this application to the bank by William Hall, was with the knowledge or assent of George Hall, and the fact was denied. William Hall was not the agent of the dissolved copartnership nor authorized to wind up its affairs.

The board of the bank, on the 13th March, 1819, adopted the following resolution:

“ The committee on accounts having enquired into the nature of Mr. Moffett's assignment, and finding that there were no privileged creditors, and that the debts were \$25,995 64, and the assets \$24,965 49, they recommend that the bank should

THE UNION BANK, vs. GEO. & WM. HALL.

accept under the assignment;" and in conformity with this resolution, the bank, by their president, within the time limited, accepted the assignment and executed a discharge to Andrew Moffett, the drawer of the note. The discharge was also signed by William Hall in his own name.

For the defendants, it was insisted that the acceptance of the assignment and the execution of the discharge, by the bank to the drawer, was at law a discharge of the endorser; that after the dissolution of the copartnership of George Hall, & Co. William Hall could not by his acts or recommendations to the bank, affect the rights of George Hall, and that the recommendation of William Hall to the bank did not alter the legal effect of the discharge; and then the defendants further insisted, that it was obviously the intention of William Hall in his recommendation to the bank, to accept the assignment of the drawer, to discharge himself from all liability on the note.

The court charged the jury that the acceptance by the bank of the dividend of the assigned estate of the drawer, Andrew Moffett, and their final discharge to him, did not, under the circumstances of this case, discharge the endorser, and that they, the jury, were bound to find for the plaintiffs, the amount claimed by them. The defendant moved for a new trial, on the grounds taken in the circuit court.

1st. That the acceptance of the assignment by the plaintiffs and the execution of the discharge to the drawer, operated as a discharge to the endorser.

2nd. That the discharge of the drawer of a note, though with the consent of the endorser, discharges also the endorser, unless there be an express agreement by him to pay the balance.

3d. That the recommendation of William Hall to the bank to accept the assignment, after the dissolution of the copartnership of George Hall and company, could not operate to the prejudice of his copartner.

4th. That there was no evidence that William Hall was the agent of the copartnership, and he was not in fact their agent.

THE UNION BANK, vs. GEO. & WM. HALL.

5th. That no assent, even by William Hall, to remain liable for the balance due on the note, could have been fairly inferred; and if such assent could have been inferred, it could not operate to the prejudice of George Hall.

King, for the motion. The rule of law is, that where the principal is discharged, the surety is discharged also, unless there is a special undertaking to remain answerable. *Pothier on oblig. (Evans' edition)* 241, 244. In such case, the principal is discharged from his liability to refund to the security who pays the debt or any part of it. The only exception is, where it is not a matter of choice, but the creditor is compelled to receive a dividend and discharge the insolvent. *Pothier* 51. In many instances, if the creditor gives the principal the indulgence of one day, he releases the surety; and can it be supposed that he may discharge him altogether and still keep the surety bound. It is not in his power to allow the security to proceed against a principal who is discharged from liability to himself. The case *ex parte Wilson*, 11 Ves. 410, is precisely analagous to the present. There the holders of a bill of exchange, by direction of the assignees of the drawer, accepted a dividend of the insolvent acceptor's effects and executed a deed of composition: this was held to discharge the drawer. William Hall intended to be discharged; he had given bail and wished to be released from it. Is there any thing like an undertaking to be answerable for the balance?

But the agreement, such as it was, was made by William Hall alone, and the question is whether, after dissolution, one partner can bind the other. The rule is that he cannot do so, if his engagement amounts to a new contract. Does not the agreement to remain answerable for the balance make a new contract? If so, it binds only William Hall.

Lance, contra. The general rule that the discharge of the principal operates the discharge of the surety, will not be questioned; but we contend that if the sureties consent to the discharge, they remain liable. It does not require an express promise to pay. If the holder of a bill or note compound with the drawer or acceptor, without the consent of the endorsers.

THE UNION BANK, vs. GEO. & WM. HALL.

he discharges the endorsers. 1 *Bac. Ab.* 422, *Tit. bankrupt; Chitty on bills*, (late *Amer. Ed.*) 385; 3 *Br. Ch. Ca.* 1; 3 *Esp. Ni. Pri. Rep.* 146. By the consent of the endorser, any sort of arrangement may be made with the drawer. *Chit. on bills*, 370, 376. In this case, the bank acted not only with the consent, but on the suggestion of William Hall; his advice was pursued throughout. In the case relied on, *ex parte Wilson*, there was no such consent. The assignees of the drawer, supposing the acceptor a bankrupt, according to the English understanding of the term, who would be discharged by operation of law, directed the holder to receive a dividend of his effects. They authorised no composition.

Though one partner, after dissolution, cannot bind the other by a new contract, he may bind him by his admission in relation to a previous contract. 2 *Bay*, 533; *Chitty on bills*, 48; 1 *Phil. Ev.* 73. The liability of the endorsers, for which we contend, is on the contract into which they entered by their endorsement. The release which is claimed for them is by operation of law. The statute of limitations effects a release by operation of law; yet there is no doubt but that the acknowledgement of one partner, after dissolution, will take a demand out of the statute. 6 *Johns. Re.* 567; *Chit. on bills*, 52, n. 1. *Id.*, 479, n. i; 2 *Phil. Ev.*, 87; 1 *Cons. Rep.* 148.

But if George Hall is released, William Hall, who consented to the composition, is not. Where one partner executed a bond in the partnership name, it was held the several bond of him who signed. 2 *Bos. & Pul.* 338.

The opinion of the court was delivered by Mr. Justice Colcock.

The doctrine of law on this subject is well settled and admits of no doubt. Where the acceptor of a bill or the maker of a note becomes insolvent or offers to compound his debts, the holder of a bill or note who accepts such composition and discharges the the acceptor or maker, thereby discharges the posterior parties, unless they have previously consented to his executing the composition deed. 1 *Bacon*, 422, title *Bankrupt; Chitty on Bills*, (American edition) p. 383-4-5.

THE UNION BANK, vs. GEO. & WM. HALL.

What is the irresistable conclusion from this language, "unless they have previously consented", that where they do consent, they are not discharged: and this follows not only from the language of the law, but from the reason on which the law is founded. Why is it that a discharge of the maker is a discharge of the endorser? Because the recourse of the endorser to the maker is thereby destroyed, and no one can deprive another of his rights without his consent; but he may give them up if he please. If the endorser finds that the maker will never be able to pay the whole debt and he is thereby jeopardized, it is to his advantage that the debt be diminished, and he is thus led to consent; and it is certainly not less absurd to say that a man may not surrender his rights, than to say he shall be deprived of them against will.

But it is said the rule is not of universal application; and to shew this, the case *ex parte Wilson*, from 11 Vesey Jun. 110, is relied on. On an examination of the case, I am satisfied that so far from impugning the general doctrine, the chancellor in his decision expressly recognizes it, dissenting, however, from a distinction of Lord Thurlow's, as to the acceptor's or drawer's having effects; a distinction which if well founded would exclude the case before us. In the first place, the parties in that case were all acting under a mistaken view of the situation of the acceptor; they all supposed him a bankrupt. In that case, the acceptor in Hamburg failed and, as was supposed, became a bankrupt; afterwards the drawer became bankrupt, the bills having been previously protested. The holder applied for a dividend of the drawer's effects, but the assignees of the drawer said, "no, you must first apply to the acceptor's funds; receive your dividend and then we will let you in for a dividend of the drawer's effects." The holder sent to Hamburg, and without enquiring into the facts, received by his agent a portion of the acceptor's effects, and this agent signed a composition deed. When the fact was disclosed and the holder applied for his dividend of the drawer's effects, he was resisted upon the general doctrine, the application of which he attempted to retort by saying, "you sent me to receive the money;" the answer to this, however, was conclusive as to the law, "we

THE UNION BANK, vs. GEO. & WM. HALL.

did not consent to his discharge; we sent you to receive the dividend of a bankrupt's estate, who is by law discharged; you should have looked into the facts;" so that the law turned on the want of consent.

It is further urged in behalf of the defendants, that the facts of the case will warrant the belief that it was the contract of the parties that the defendants should be released, as well as Moffett, and this it is said is apparent from the language of William Hall to the bank; "if you persist in your suit, you will only embarrass me and receive no benefit yourselves, for the assets of George Hall & Co. will not pay their own debts." In order to give construction to these words, let us look to the facts. The note had been regularly protested; all the parties sued, and William Hall held to bail. The amount of Moffett's debts were about \$25,000, and the assets \$24,000. The deed of Moffett was signed by about thirty creditors; the deficiency contemplated was about \$1,000, which divided among thirty creditors would make the loss of each a little more than thirty dollars. In the first place then, it is not unreasonable to suppose that Hall did not regard so trifling a balance; but if his object had been to be discharged, can it be believed that he would have failed to say so expressly; his letter then is only a proposition. Suppose, however, that Hall really intended that he should be discharged; does it follow that the bank agreed to this part of his arrangement. Do not the circumstances of the case show beyond all doubt, that they did not. Why was not the note given up? Why were not Hall's bail released from their bond? Does a man pay a debt and leave the evidence of the debt in the hands of his creditor? Does he suffer his friend to remain bound, when he has discharged his liability? This is utterly inconsistent with the conduct of a man of business. Again, suppose it was Hall's intention to be released, why should the bank comply with this part of his requisition? What was the consideration which was to induce them to release him? Not the money received from Moffett; for if they had intended to discharge Hall, they could have taken the dividend of Moffett's assets without the leave of Hall.

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

On the last ground, it is only necessary to point to that clear distinction laid down by the law, between those acts which a co-partner may do after the dissolution of the copartnership, and those which he cannot do. After the dissolution of a copartnership, one copartner cannot create any new liability, but he may keep alive an old one; one copartner may, after the dissolution of the copartnership, revive a debt barred by the statute. *Simpson & Morrison, ads. Geddes, 2 Bay, 533.* Here no new liability has been created, but an act done which lessens the liability which did exist. Where an act is done for the benefit of one, his assent is implied. But there is one fact in the case which to my mind is conclusive on this point. On the failure of George Hall and Co. they assigned their effects to Kiddle and McNeill & Co. who may then be considered as their agents, for the purpose of collecting and paying their debts; and they as assignees of George Hall, & Co. (so expressly styling themselves) sign the discharge of Moffett; what ground of complaint then can George Hall have?

The motion is discharged.—*Bay, Gantt, & Johnson* Justices, concurred.

King, for motion.

Lance, contra.



DEPAU, DEAS, & Co. *ads. Ex'ors.* THOS. M. BROWNE.

Bill of exchange, payable after sight, and dated 20th. June, drawn by Deft's in Charleston, on W. of New-York: The first bill of the set, which had been sent by Post, directed to the payee in New-York, was presented by a person unknown; with the name of the payee endorsed, but not in his hand writing; accepted 1st. July, and at maturity paid: After the payment, the second of the set was presented by the payee, protested for non-acceptance 31st. of August, and for non-payment 18th September, and notice given to drawers: In an action on the second bill against the drawers, a verdict was found for plaintiffs and a new trial refused.

THIS was an action of assumpsit brought on a bill of Exchange for one thousand dollars, dated the twentieth of June

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

1816, drawn by the defendants upon Mr. Willink of New York, in favor of the plaintiff's testator. It was protested for non-acceptance on the 31st. August and for non-payment on the 18th Sept. and notice of both was admitted to have been given in due time.

The first ground of defence was, that the bill sued on, being the second of the set of Exchange, was void, because the first of the set had been presented, accepted and paid by drawee.

To establish this part of the defence, the defendants produced the first of the set, with Willink's acceptance thereon, dated 1st. of July 1816, and the name of Thomas M. Browne endorsed thereon; also the examination by commission of Herman Vos and John C. Zimmerman, residents of New-York and agents of Willink, the drawee. Vos proved that the first of the set, which was annexed to the commission by defendants, had been accepted by him, as agent for and by the express direction of Willink; that he did not know the person who presented it, but he appeared to be between 18 and 20 years of age; that about two or three weeks after the bill was at maturity, Willink informed him (the witness) that Mr. F. Depau of New-York had called to forbid the payment of the bill, as it had got into wrong hands. He further testified that he did not know Mr. Browne, the payee, nor did he know the person who presented the bill, but he had no good reason to believe that the bill was paid to one who had fraudulently obtained possession of it. Mr. Zimmerman testified that he did not know if it was Mr. Browne who presented the bill to him; that he (witness) paid the bill, being authorized by Willink to pay such bills, drafts &c. as might be drawn on him by defendants; that the bill was indorsed as at present, (the bill being shown to him) but he could not recollect the person to whom he paid it; that about two or three weeks after the maturity of the bill, a Mr. Brewster, calling himself the agent of Mr. Browne, enquired of witness if the bill had been paid; who answered it had, by Willink's direction. Brewster then said it had got into wrong hands. Witness never knew Browne, nor did he know the man

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

who presented the bill to him and to whom he paid the amount; that he neither knew nor believed that it was presented by any person who had fraudulently obtained it; nor had he any doubt but that it was paid to a bona fide holder, until Brewster called on him as aforesaid: the bill was paid by witness a few days before the day of maturity, but how many he did not recollect, nor what rate of discount was allowed for thus paying. The defendants also proved that the drawee, Willink, remained in good credit till April 1819, when he became insolvent. The plaintiff in reply called John G. McKnight, who testified that he knew Browne the plaintiff's testator well and knew his hand writing; that the endorsement on the bill bore no resemblance to Browne's writing, and he did not believe it was his; he further testified that the indorsement on the second bill was Browne's, and the difference between the two indorsements was in the *B* and *r* and size of the whole word. Mr. Delieseline also testified that he knew the plaintiff's testator's hand writing, and that the indorsement of the first bill did not correspond with any writing witness ever saw of his; that Browne, in 1806, was about 31 or 32 years old and seemed older; that his character was excellent. It was here admitted that Thomas Cormick, the agent of Browne in Charleston, bought this bill of defendants and sent it on to New-York, to Thomas M. Browne, by post.

Here the case closed, when the plaintiff contended that he had a right to recover, as the payment to the person who presented it was no payment to plaintiff, that person not being authorized by plaintiff to receive it. To this the defendant replied that the possession of the bill was itself an authority to present it for acceptance and payment, unless notice had been given by the owner, that the person in possession obtained it *male fide*; that this fact at least ought to have been distinctly proved; for it could not be inferred simply from the endorsement being unlike the plaintiff's; that if drawees in foreign countries are not to pay upon the production of bills apparently regular, without proof of the endorsements and legal possession of the holders, the uses of bills of Exchange will be so abridged as seriously to

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

affect commerce, that the plaintiff's course, at any rate, was to have demanded payment of Willink, the acceptor, who was irrevocably liable on his acceptance; and on his refusal, to have given notice thereof to defendants immediately, and to have protested it; that this was not done, and even the second bill was not presented until the 31st. August, two months and eleven days after the date, which delay was unreasonable and destroyed the plaintiff's right to recover against these defendants; that if any loss has accrued to the plaintiffs in this case, it arose from their act and not the defendants; and where the equity is equal, a plaintiff can recover nothing in this action.

The presiding judge charged in favor of the plaintiffs, and the jury found accordingly under his directions, with damages and interest. The defendants therefore moved the court to set aside the verdict, on the following grounds; to wit:

1st. Because the first of the set of the bills of exchange on which the action was brought, was accepted and paid by the drawee to the holder.

2nd. Because there was no evidence of the loss of the bill or that it was not endorsed by the payee, except that the endorsement did not resemble his hand writing.

3rd. Because there was no evidence that the holder, who received payment, acquired the bill *mala fide*, or that the acceptor had any intimation that the bill had been lost or ought not to be paid.

4th. Because if the payment of the first of the set was no discharge to the drawee, the plaintiff should have protested it and notified the defendants thereof, before he could proceed to recover the amount from them.

5th. Because if the first of the set was neither accepted nor paid in law, the defendants are discharged from liability on the second (on which the suit is brought) for want of its being presented in reasonable time.

6th. Because, if when the equity is equal, the plaintiff cannot recover, he assuredly cannot where the loss, as in the present case, arose from his own acts.

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

Prioleau, for motion. Possession of a bill of exchange is of itself a sufficient authority to present for acceptance, &c. 1 *Dallas*, 193; 1 *Bos. & Pul.* 651; 103.

It is said the payment was not good, because the endorsement was forged. The evidence does not justify that conclusion; the facts were equivocal and forgery ought not to be presumed.

Possession of a bill is prima facie evidence of right, and payment by the drawer is good, unless it appear that he knew the holder came by it improperly. The bona fide holder of a bill endorsed in blank, may maintain an action in his own name, though it may have been illegally and fraudulently obtained by a previous holder; and if it be paid, to a bona fide holder, on a forged endorsement, the money cannot be recovered back. *Chit. on bills*, 145, 184, 192, n. 1. 4 *Mass. T. R.* 42; 2 *Doug.* 632 4; 3 *Burr.* 1354. These rules are established on commercial principles. The convenience of trade and exchange require an adherence to them. A contrary rule would oblige the bearer of every bill of exchange to prove his identity, before he would be entitled to recover the amount of the bill.

Notice of non-payment must be given by the next mail after the expiration of the three days of grace. 2 *Wheaton* 377; 1 *N. & M.* 469. Soon after the payment of the first bill of the set, the plaintiff's agent was informed of the fact: this was a refusal to pay it him and he ought to have given immediate notice to the defendants.

Protest must be made of a foreign bill; nothing will supply its place. *Chitty*, 278.

The party loses his remedy if he neglect presentation in due time; and the rule is the same in this respect, as to notice of non-acceptance or non-payment; it must be done in reasonable time. *Chitty*, 207; 1 *M'Cord*, 322. There were seventy one days between the drawing and presentation, and the mail passes weekly between New-York and Charleston.

If the bill be lost, it is the duty of the owner to give notice. *Chitty* 195. Plaintiffs neglected to do so.

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

Dunkin, contra. It is contended that the payment by Willink was good and therefore that the defendants are not liable, but the rule of law is that a forged endorsement does not justify the payment. *Chitty* 192; 4 *T. R.* 28; 3 *T. R.* 137. All the cases quoted in favor of the motion will be found to have been cases of genuine endorsements in blank.

It is objected that due diligence was not used. This must depend on all the circumstances, and it was for the jury to determine whether there were any laches or no. *Chitty*, 210, 211; 2 *Hy. Blackstone* 569; 2 *Cowp.* 463; 3 *Johns. ca.* 262. But if it was a matter for the court, the circumstances prove that every thing in the power of the plaintiffs was done.

Grim e, against the motion. The payment of the first bill of the set by Willink was made without authority, for there is no pretence that the endorsement was in the hand writing of Browne. He was therefore bound to honor the second, precisely in the same manner as if the first had never existed or had never been presented.

An acceptance is an admission only of the hand writing of the drawer, but not that the endorsement is genuine, for the acceptor may shew in an action at the suit of the endorsee, that the endorsement was forged. It is incumbent on the plaintiff, endorsee, in an action against the acceptor, to prove the endorsement. *Smith vs. Chester*, 1 *T. R.* 654; 1 *Moore's index*, 150; 6 *Mass. T. Rep.* 38.

With respect to notice, the first of the set was accepted and paid without the knowledge of the plaintiff; and it could not be expected that he should be able to give notice. It was the duty of Willink who was, pro hac vice, the agent of the defendants, to have given them the notice, when they might themselves have detected the fraud. If they did not, it was their own fault.

There is no certain rule as to what shall be reasonable diligence in the presentation of a bill payable at or after sight. The object of procuring the bill, the use intended to be made of it, the distance &c. must be taken into the account.

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE

Prioleau, in reply. The endorser of a note and the drawer of a bill of exchange, stand in the relation of securities, and courts of law, as well as of equity, will readily lay hold of any circumstance to relieve them from their liability. Willink had accepted the first of the set, this he might do without an endorsement, and it does not appear that it was then endorsed. The payee might have protested it for non-payment, or he might have brought his action on the acceptance and called on Willink to produce the bill, or he might have maintained trover for it. *Phil. Ev.* 336, 8, 9; 346, 7.

The opinion of the court was delivered by Mr. Justice Colloc.

I shall first take notice of those grounds in the brief which relate to the facts, which are the second and third. The evidence was by two persons who knew the hand writing of Browne, that the endorsement on the first set was not in his hand writing; and it was also in evidence that the bill had been sent on by the mail, and that Browne had left New-York before the bill was paid. This evidence was submitted to the jury, as proof that the bill did get into wrong hands, and their verdict shews that they were satisfied of it. Indeed there can be no doubt on the subject. The case will be considered then as a case in which the bill was not endorsed by the payee.

The law is clear, that to make the payment of a bill of exchange valid, it is necessary that it should be endorsed by the payee or by some person legally authorized to make the endorsement for him. When a bill is so endorsed, it may be paid to the holder: *hitty on Bills*, 144, 145, 176, and this was the case in all the authorities relied on by the defendant's counsel. They are all cases of endorsement by the payee or one empowered by him, as in the case of a blank endorsement, with authority to fill up. But if paid without endorsement or on a forged endorsement, the payment is not valid. "When a bill is assignable only by endorsement, as no interest in it can be conveyed otherwise than by that act, any person getting possession of it by a forged endorsement, will not acquire any interest in it, although he was not aware of the forgery; and consequently the original

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

holder in such case may, when he has regained possession of the bill, recover against the acceptor and drawer, although the acceptor may have paid the bill; and if the person attempting to derive an interest under such endorsement, sue the acceptor, he will be admitted to prove that the endorsement was not made by the person entitled to make it." *Chitty on Bills*, p. 192-3; *Mead & Young*, 4 *Term Reports*, 28, and the case of *Cheap and another, vs. Harley & Drummond*, cited 3 *Term Reports*, 127; which is in all the facts the very case before us. The defendant who had a house in America as well as in London, drew two bills of exchange there, the first and second of the same tenor and date, on a third house here, payable to the plaintiffs. One of them being lost came into the hands of a third person, who forged an endorsement of the payees and received the amount of it from the defendants here; and afterwards the real payees brought their action upon the other bill and recovered. See also the case of *Archer, vs. the Gov'rs. & Co. of the Bank of England*, *Doug.* 337.

Nor can the position contended for by the defendant's counsel, "that an acceptance binds the acceptor, even where the endorsement is fraudulent," be maintained: if one accept a bill which appears to have been endorsed by the payee, and afterwards discover that the hand-writing of the payee has been forged, he is not bound; the acceptance only acknowledges the hand-writing of the drawer. It is laid down in *Chitty*, p. 500, that in an action against the acceptor, the first endorsement of the bill must be proved, although it was payable to drawer's own order and endorsed by him, because the acceptance only admits the hand-writing of the party as drawer and not endorser; and it has even been holden that the circumstance of the defendant's having accepted the bill after it was endorsed, does not dispense with proof of such endorsement, and proof that the bill was endorsed by a person of the same name, as in the case of *Mead & Young*, 3 *Term Reports*, 28, before referred to, was not sufficient.

But defendants contend that even if the payment of the first of the set by Willink, was not a valid payment, yet that

DEPAU, DEAS, & Co. *ads. Ex'ors.* BROWNE.

there was such laches in the presentment of the second, as will discharge the defendants. There seems to be a difference of opinion, not only in our States but in England, whether the question of diligence is for the determination of the court or the jury. With deference to the opinion of those from whom I differ, I think it must always be for the jury, for it depends on that determination of facts which is exclusively for the jury. No general rule can be laid down. The cases of bills payable after sight, vary from a few days to a year, depending on an infinite variety of circumstances. In *Chitty*, page 208, it is laid down, in the case of a foreign bill payable after sight, that it is no laches to put it into circulation before acceptance, and to keep it in circulation without acceptance as long as the convenience of the successive holders requires, and it has even been decided that if a bill drawn at three days sight were kept out in that way for a year, this would be no laches. *Muilman vs. D'Eguino*, 2d. H. *Blackstone*, 565; in which case, *C. J. Eyre* says no fixed rule can be laid down, it would clog these negotiations; it must depend upon the particular circumstances of the case and must be left to the jury to determine. *Justice Buller*; "there is no rule but due diligence, without regard to the character of the bill, if put into circulation it is enough," he adds "if the holder were to lock it up for any length of time, I should say it was laches, but further than this no rule can be laid down." Here the circumstances of the case will justify the delay. Browne was on his way home; as soon as he arrived here and heard the fate of his bill, he procured the second of the set (and it was said and not denied, set off in person) and presented it as soon as he arrived in New-York; when refused to be accepted or paid, he protested it and gave due notice. But why is a bill to be presented in a reasonable time? To prevent injury to the drawer. Now had the second of the set in this case been presented on the very day after the payment, would the defendants have been placed in a better situation? the misfortune had occurred, and that from the negligence of the drawee or his clerks, it was irreparable and the defendants must be the losers.

WILLINCK, vs. DAVIS.

The motion is dismissed.—*Bay, Nott, Johnson & Huger*, Justices concurred.

Prioleau, for motion.

Grimke & Dunkin, contra.

There is no doubt. I suppose. that if a bill or note, payable to order, be transferred, *bona fide*, by the payee, without endorsement, though the holder does not acquire such a property in it as will enable him to sustain a suit in his own name, yet he has such an authority to receive, that the acceptor or drawer making payment to him will be discharged.

The position which seems to have been intended to be principally relied on is, that the possession of a bill not endorsed, is such evidence, *prima facie*, of authority from the payee, as to throw upon him the proof that it was lost, or that the holder acquired it *mala fide*: and this seems to be supported by several of the authorities cited.

The holder's being in possession with a forged endorsement on the bill, would certainly be a strong circumstance to shew that it was unfairly acquired; and the further ground appears to have been taken, that proof of its not being the hand writing of the payee, was not sufficient to shew the endorsement forged; as some one else might have made it by his direction.

FREDERICK WILLINCK, vs. REBECCA DAVIS.

Defendant in Havanna, engaged a passage to Charleston, for herself and slave, in plaintiff's vessel. Her promise at Havanna, to indemnify plaintiff against the damages he might sustain by bringing the slave into Charleston, in violation of the laws of the United States, would have been void; her promise, after the seizure of the vessel and slave in Charleston, was nudum pactum.

This was an action for money laid out and expended for the defendant. It appeared that the defendant resided in Havanna, and applied to the plaintiff, the owner of a vessel, for a passage to Charleston. She was in bad health and required the attendance of her negro servant. Some apprehension was entertained, by both plaintiff and defendant, that the servant could not legally be brought within the United States, though neither appeared to be certain on the subject; and after some negotiation, the plaintiff agreed to bring her and her servant, neither of them intending to infringe the laws of the Union. On their arrival in Charleston, the vessel and negro were both seized under the

WILLINCK, vs. DAVIS.

act of congress, and both the plaintiff and defendant were by the District Attorney, held liable for the penalty. They joined in a petition to the government, setting forth the facts and praying a re-delivery of the property and remission of the penalty. The government ordered the property to be released on the payment of the costs; and these costs and other expenses incurred came to about \$365 19 cents, which were paid by the plaintiff. It was not proved that the defendant had promised to pay these expenses before she left Havanna; but after the vessel was seized in Charleston; and even this did not appear to have been said to the plaintiff. It was proved that she had joined in the petition.

The plaintiff contended that he was entitled to recover the whole amount from her. The Court directed the jury that her promise was nudum pactum, and that the plaintiff was not entitled to recover; and on this charge the jury found for the defendant. The plaintiff now moved for a new trial, on the grounds:

1st. That the principle, that a promise to indemnify against the violation of a law is void, did not apply to this case. There was no intention to violate any law, and no law was in fact violated.

2d. That the promise of the defendant to pay all the expenses was fully proved, was good in law, as given on a good consideration and was obligatory on the defendants.

3d. Because there was evidence before the court that services had been rendered to the defendant and money expended on her account by the plaintiff, for which he was by law entitled to be reimbursed.

The opinion of the court was delivered by Mr. Justice Richardson.

The evidence of the promise to reimburse the plaintiff the damages he might sustain came from Mr. John White, who stated that after the vessel had been seized in Charleston, the defendant said she would pay all damages; But even this did not appear to have been said to the plaintiff, and Mr. White further stated that he understood that at Havanna they had no doubt that the negro might be brought to Charleston. Whether then the defendant had ever made any promise to

STEAM BOAT COMPANY, *ads.* BASON.

answer for the damages at any time was questionable. If made at Havanna, for bringing a slave into the United States, but which did not appear, it would have been a promise to indemnify the plaintiff for violating the laws of the United States, which would have been void as against sound policy; if made at Charleston after the seizure of the vessel, of which there was but little evidence, it was a gratuitous undertaking without any consideration. The defendant took a passage for herself and slave from Havanna, upon the usual terms. Both vessel and cargo became liable to seizure and were seized, each party ran a separate and distinct risk, the defendant that of the loss of her slave, &c. and the plaintiff that of the loss of his vessel &c. and a promise by either to indemnify the other was without consideration and therefore void

The motion is unanimously dismissed—*Nott, Gant, Johnson & Huger*, Justices, concurred.

King, for motion.

Crafts & Eckhard, contra.

—

THE CHARLESTON AND COLUMBIA STEAM BOAT COMPANY, *ads.*
WILLIAM P. BASON.

The Steam Boat of defendants, going through an inland passage to Charleston, grounded from the reflux of the tide, in consequence of which she fell over, the bilge water rose into the cabin and injured a box of books belonging to plaintiff: Held that defendants were liable for the loss so occasioned.

THIS was a process to recover \$53 87, the amount of actual injury to a box of books shipped in the Steam Boat from Columbia to Charleston. The bill of lading contained the usual clause, the goods to be delivered in like condition as shipped, "the dangers of the navigation excepted."

It was proved that the box was placed in the cabin of the boat; she was compelled to come to an anchor, to wait the flood tide; pains were taken that she should take the ground evenly at low water, and while she was yet afloat, she was pumped, but when she grounded, she fell over on her beam ends inclining

STEAM BOAT COMPANY, *ads.* BASON.

greatly towards the stern of the boat on the side on which this box lay, and the bilge water rose on this box and did the injury complained of. The defendants insisted that this action came within the exception of the bill of lading and that they were not answerable for the loss. But the court decreed for the plaintiff, and the defendants moved for a new trial on the ground;

That as the damage complained of arose from unavoidable accident and came clearly within the exception in the bill of lading, "dangers of the navigation," the defendants were not liable, and the decree should have been generally for the defendants.

King, for the motion. We admit the rule of common law, that the carrier is liable for every thing but unavoidable accidents. Unavoidable accident or the act of God, seems to mean the same thing as "perils of the sea," or when applied to our inland navigation, "perils of the river," and this is the expression of the exception in the bill of lading. The general rule of insurance is that the underwriter shall be liable for all losses occasioned by *perils of the sea*; and I conclude that if the insurer would be liable, the carrier will not. The boat stranded on her passage to Charleston, from the reflux of the tide; this was what no human care could controul or prevent; and forms the precise case in which the liability of insurers would be incurred. 3 *Camp. Ni. Pri. Rep.* 429; 4 *amp.* 283; 4 *Maule and Selwyn*, 77; *Stevens on average*, 229.

In the cases of *Eveleigh and Sylvester*, and *Means and Taylor*, decided in this court, it was held that a hidden snag was one of the perils of the river, and the boat's running on it an unavoidable accident; but not more unavoidable certainly, than the falling of the tide and the boat's grounding in consequence. The carrier is liable for any degree of negligence, for bad stowage. But the greatest care was used in this case; the books were placed in the cabin, the safest part of the boat.

Rice, contra. There is a distinction between the difficulties and the dangers of navigation. The perils of the sea are those which can neither be foreseen nor guarded against, and for the consequences of these, the carrier is not liable, he is com-

STEAM BOAT COMPANY, *ads.* BASON.

sidered an insurer against the difficulties of the navigation and risks which are foreseen. This very difficulty was foreseen and entered into the undertaking of the carrier. The operation of natural causes is not always considered the act of God. If a ship be driven by winds against a rock not generally known or shallows suddenly formed, the carrier is excused; not so if the rock were known or the shallow existed before. 2 *Com. on Con.* 329.

It is said the carrier shall not be liable, if the insurer is. But the insurers liability depends altogether on his contract; the carrier is considered an insurer against all but a particular sort of risks, and both may be liable.

It is the duty of the carrier so to stow and arrange his cargo according to its quality, as to preserve it from the effects of leakage. *Abbot on shipping*, 242. This might have been done in the present instance and was neglected.

The opinion of the court was delivered by Mr. Justice Richardson.

It will be satisfactory to record the evidence, as adduced on the part of the defendants by way of excuse. Captain Wilkie said the boat grounded, hove off, came to anchor, was pumped and again grounded. She then heeled to starboard and the bilge water settled aft and injured the books in the cabin. Upon discovering that they were wet, he had the books removed from the cabin. He further said that there is no avoiding grounding in coming through the channel. To ground, he said, is an unavoidable accident.

Inland navigation, by the means of steam-boats, has been introduced into South-Carolina within the last seven years; and the use of these boats has accelerated and cheapened so much the carriage of our produce to market, and has so actively co-operated with schemes of internal improvement generally, that I should be sorry indeed to impose any check on the enterprise of the steam boat companies. On the other hand, their own final advantage depends greatly upon the implicit confidence of the public, arising from the known safety of the goods committed to their charge.

STEAM BOAT COMPANY, *ads.* BASON.

But whatever may be the just estimate of their chances of success, the law of common carriers has been well settled and is convenient, safe and wholesome. The carrier is bound, not only to take all due care of the thing committed to his charge, but he is placed by the common Law in the character of an insurer in many respects, and liable for all losses except, first, in cases where the injury appears to have arisen from some act, not done by the hand of man, unless by public enemies or the owner himself; or 2nd. in cases where the loss could not be guarded against by human skill and prudence. The severity of the law arises from the circumstance that the thing carried is entirely within the power of the carrier, and were he not liable, *prima facie*, upon the bare fact of a loss appearing, his employer could have no means of proof, and dishonest collusions might be easily entered into to rob and share the spoil; *exempli gratia*, how easy would it be to rob the boat, and then raise the appearance of an accidental loss by fire: 5th. *East*, 428; 1 *Term R.* 27; 4 *Term R.* 528; 2 *Com. on Con.* 292, 323; 2 *Raymd* 918; *Abbott*, 242.

In the case before us, the box of books had been placed in the cabin, and after the accident of grounding, the bilge water rose and injured the books. But may not the injury have been avoided by due diligence and attention on the part of the carriers. It is said, that according to the character and channel of the creek where the boat grounded, the grounding is unavoidable, while waiting for the tide. But admitting this, it does not follow that the carrier may not select with proper skill the place where the boat is to come to anchor, and where he ought to know she must ground, in order that she may ground upon a safe bottom. But let it be admitted that the grounding was altogether unavoidable and the carrier no way liable for that accident; yet it does not follow that such a quantity of bilge water as will reach the cargo stowed in the cabin, was also an unavoidable accident. The moment the boat heeled, it followed that the bilge water would settle towards the stern; and the carrier was bound to know this, and to remove, if necessary, the cargo there stowed. The box of books, being in the cabin,

STEAM BOAT COMPANY, *ads.* BASON.

could have been as easily removed before as after the injury. The carrier is liable for bad stowage or default of good keeping. Cro: James, 330; 1 Bacon, 344. The injury then was not an unavoidable consequence of the grounding, but the consequence of negligence on grounding and does not come within the exception in the bill of lading.

Many injuries for which a carrier is liable may be still traced to some unavoidable though remote cause. To illustrate the distinction, I will take the case of *Eveleigh vs. Sylvester*, which has been relied upon, on the part of the defendants. There the unavoidable accident, under which the defendant was protected against the loss, was that a hidden snag pierced the boat and she sunk. It is to be observed that in our river navigation, owing to the forests upon their banks and frequent inundations, hidden snags frequently occur, and constitute a danger peculiar to rivers so situated; and from the frequent shifting of these snags and their recurrence from freshets, they constitute in our rivers an instance of the *actus Dei*, which skill and experience cannot guard against; and hence, reasonably, and I may add naturally, this new exception to the liability of carriers at common law. Looking to the rationale of the rule, that a carrier is liable for all accidents, except by the act of God or the public enemy; and regarding the proper character of our rivers, we know that snags infest our inland navigation, and being wholly concealed, arise no more from the intervention of man than storms or lightning. Regarding, therefore, the justice, reason and convenience of the rule at common law, the judges in the case of *Eveleigh & Sylvester* recognized an old practice of excepting the dangers of the river, and extended the rule to hidden snags. But suppose for a moment the snag not hidden, or one which might have been discovered by the rippling of the water, or suppose the snag, though hidden, yet known to the patroons of river craft, would an accident arising from it constitute any excuse? Surely not. Or suppose the snag, though new and hidden, to have been so weak as that it could not have pierced the bottom of a sound hull: In none of those instances could it form an excuse for the carrier. Again, suppose the

GLOVER, vs. MILLER. KECKELY, ads. CUMMINS & KEITH.

snag to pierce a sound boat, but to let in only so much water as by diligent exertion might be kept down, would the bare name of an accident by a snag, throw a mantle over negligence or shield the carrier from the charge of after inactivity? Surely not. Even where high winds assail a vessel and she perishes, but evidently from unsoundness or want of skill, the carrier is liable. Now apply such reasoning to the case before us. Suppose the carrier justified in grounding, because he must wait for the coming tide, yet still he may choose his place of casting anchor skilfully. Go further, and say he did choose the best place, yet could he not have saved the box of books placed in the cabin from the bilgewater by human foresight and due diligence. It appears to me that due care would have prevented the injury, and that the carrier is in a situation similar to those I have suggested, of a boat unavoidably injured, but the damage to the cargo still avoidable by diligence and activity. The motion is, therefore, dismissed.

Colcock, Gantt, and Johnson, Justices, concurred.

King, for the motion.

Rice, contra.



JOSEPH GLOVER, vs. Adm'r. WM. H. MILLER.

THE Court being satisfied from the affidavit furnished in this case, that it was not in the power of the plaintiff to produce the receipt against part of the account, on which defendant claims a set off, on the trial, are of opinion that a new trial ought to be granted.

Noti, Gantt, Colcock, Richardson, and Johnson, Justices, concurred.



G. KECKELY, ads. CUMMINS & KEITH.

Defendant's children entering a school and continuing one quarter and part of another, he is liable, on proof of a custom to that effect, to pay for both quarters.

DRUMMOND, vs. S. HYAMS & M. K. HYAMS.

THE plaintiff proved that the children of the defendant entered his school, on the day of and continued to attend it one quarter and a part of another. The defendant offered to pay for the time the children were actually at school, but the plaintiffs contended that as the last days were part of a new quarter, they were entitled to be paid for the whole, and produced one or two witnesses to that point, and the presiding judge ruled the custom a valid one. An appeal was made on the ground, that the defendant was only bound to pay for services actually performed.

The opinion of the court was delivered by Mr. Justice Huger.

The custom has long prevailed in this state of charging by the quarter, and I do not recollect any instance of its having been contested. The custom is a reasonable one and ought to be supported.

The motion must therefore be dismissed.

Nott, Colcock, and Johnson, Justices, concurred.

JAMES DRUMMOND, vs. SAMUEL HYAMS, AND M. K. HYAMS.

Shoemaker's books, to which entries were transferred from a slate, without proving who made the entries on the slate, or that they were daily transferred, not evidence.

THIS was an action on an open account, by a shoemaker, for boots and shoes, said to be delivered to the defendants. The plaintiff produced his books; and the clerk who made the entries, on being sworn, stated that the entries were copied from a slate kept in the store, on which the original entries were made. On being cross-examined, he stated that the items were not always copied into the books on the day on which the entries were made on the slate, and he could not say that the items in question were copied into the book on the day on which they were entered on the slate, nor could he say by whom they had been made on the slate, nor could he prove the delivery of the boots and shoes. The plaintiff was non-suited by the Rex

PAGE vs. LOUD.

order. A motion is now submitted to set aside that non-suit.

The opinion of the court was delivered by Mr. Justice Huger.

A shoe-maker's books are not evidence at common law, nor are they made so by statute, the practice however of receiving them as such has too long prevailed in this state to be now disturbed; but it must be confined to the limits hitherto assigned it. The original entries must be produced. It is not enough to produce the copy of an original entry, made by we know not whom, to entitle the plaintiff to recover.

The motion is therefore refused.

Bay, Nott, Colcock, and Johnson, Justices, concurred.



JOHN PAGE, vs. JOHN LOUD.

The insolvency of the maker of a promissory note, does not dispense with the necessity of giving notice of his default, in order to charge the endorser.

THIS was an action by the endorsee of a promissory note against the endorser. The defence was a want of notice of the maker's default. The plaintiff proved that the drawer of the note was notoriously insolvent at the time of endorsement, and contented that from the circumstances it appeared that defendant could not be ignorant of the fact, and that such insolvency dispensed with the necessity of notice. The Recorder decided that notice was necessary, and non-suited the plaintiff. A motion is now made to reverse the decision of the Recorder, and to grant a new trial.

Gadsden, for the motion. A promissory note, after endorsement, is entirely analagous to a bill of exchange. If the drawee neglects to pay a bill, it is necessary to give notice to the drawer, in order to charge him; but that the drawer had no funds in the hands of the drawee, has been always held to dispense with the necessity of notice. 1 N. & M. 434; *Chit. on Bills*, 163; 1, *Caines*, 157; *Chit.* 152.

The endorser of a note, knowing the insolvency of the maker, has no right to insist on notice. *Deberdt, vs. Atkinson*.

PAGE, *vs.* LOUD.

2. *Hy. Bl.* 336. Under the circumstances in that case, it was decided that notice was unnecessary. The case in 2 *Hy. Bl.* 609, went off on a different ground. In the case of *Jac son vs. Richards*, 2 *Caines*, 343, there was no evidence that the insolvency of the maker was known to the endorser, at the time of his endorsement. In the case of *Kiddell and Ford*, 2 *Treadway*, 678, it was only decided by the Constitutional Court, that the reputation of insolvency does not dispense with the necessity of notice. Judge Brevard, in that case, refers to the case of *Clarke & Minton*, decided in this court in 1807, in which it is said to have been decided that the insolvency of the maker dispenses with the necessity of notice to the endorser.

It is used as an argument against the analogy on which we rely, that the endorser of a note is not supposed to have funds in the hands of the maker, and that the necessity of notice cannot depend on that circumstance: but endorsing the note of a maker whom the endorser knows to be insolvent, seems to be precisely equivalent to drawing on one who has no funds.

Arson, contra. Every contractor is bound by the terms of his contract. The contract of the endorser of a note is, I will pay if the maker does not, and due notice be given me of his default. He makes it a condition of his liability, and whether it be of advantage to him or no, it must be performed. The drawer of a bill contracts that he has funds in the hands of the drawee, and it is a fraud if he have not.

The case of *Nicholson and Gouthitt*, 2 *Hy. Bl.* 609, overrules the case of *De Berdt & Atkinson*. In that case, the endorser knew of the insolvency, the Chief Justice said he sustained no injury from the neglect to give notice, it was a hard case and the justice was with the plaintiffs; yet it was held that the necessity for demand and notice was imperative. Judge Kent gives an opinion, 2 *Caines*, 343, that the case of *Nicholson and Gouthitt* overrules that of *De Berdt and Atkinson*, and was decided on better reasoning. *Chitty on bills*, 214, refers to *De Berdt and Atkinson*, and questions its authority. In 4 *Cranch*, 163, Judge Marshall says, if any thing can dispense with the necessity of notice, it is the endorser's knowledge of the maker's

PAGE, vs. LOUD.

- insolvency. Neither death nor insolvency, nor the drawee's having informed the holder that the bill would not be paid, removes the necessity of demand and notice. *Chitty on bills*, 223, 4, 5; American note and authorities there cited; 4 *Taunt.* 471.

Gadsden, in reply. The reason of the law requiring notice to the drawer of a bill, is that he may withdraw his funds and secure himself. If he have no funds in the drawers hands, notice is unnecessary. Lord Mansfield says that after a note is endorsed, it does not differ from a bill. The drawer of a bill, without funds in the hands of the drawee, does not expect it to be paid; notice can do him no good, and he has no right to require it. What possible advantage can the endorser, who knows the maker of the note to be insolvent, derive from notice? It is said that the contract is conditional; to pay if maker does not and notice be given: but when he knows, at the time of making his endorsement, that the maker will not pay and that he will be resorted to, it becomes unconditional. The note circulates on his credit, and he knows that he must provide for its payment.

The question of the endorser's knowledge of the insolvency did not arise in the case of Nicholson and Gouthitt; and the circumstances of the case excluded the supposition that there could have been such knowledge. The various cases cited were determined on their peculiar circumstances; none of them go the length of determining that the endorser who knows the maker's insolvency, at the time of his endorsement, is entitled to notice. Were further cited: 1 *Esp. Rep.* 302; *Bail. on Bills*, 81; 11 *John. Rep.* 182.

The opinion of the court was delivered by Mr. Justice Huger.

As soon as a note is endorsed it is assimilated to a bill of exchange. The endorser becomes the drawer; the maker the acceptor and the endorsee, the payee, and the law relative to bills becomes applicable to it. The note in question then was a bill drawn on Cook, by defendant, and payable to the plaintiff. The law implies a promise on the part of the drawer to pay the bill if the acceptor does not; provided notice of default on the

PAGE, vs. LOUD.

part of the acceptor be given to the drawer in a reasonable time by the payee. Notice is an important part of the contract, and is as binding, though implied, as if expressed. If the drawer has funds in the hands of the drawee, it enables him to take steps for their security; and if he has not, he is afforded an opportunity of making arrangements to pay the bill, and it may prevent a different appropriation of his funds. Were it therefore *res integra*, I should be opposed to the exception, now too well established by authority to be shaken, that a want of funds in the hands of the drawee dispenses with the necessity of notice to the drawer. I am not satisfied to rest this exception on the ground of fraud. Bills may frequently be drawn by one who has no funds in the hands of the drawee, without the smallest imputation of fraud. If fraud does exist, it must vitiate this, as it does all contracts, *in toto*.

It has been contended at the bar, that insolvency comes within the reason of the exception already noticed, and the case of *De Berdt, vs. Atkinson*, (2 H. Blackstone, 338,) is relied upon as authority. In that case however, Mr. Justice Buller bottoms his opinion upon the fact that it was an accommodation note, and that no value had been given by the payee for the note. In this case, there is no such pretence. The case however of *De Berdt and Atkinson* has since been impeached and overruled. Mr. Bayley (3 Edn. 136,) in his treatise on bills, observes that the court appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances: in those cases the drawee, being himself the real debtor, acquires no right of action against the acceptor by paying the bill and suffers no injury from the want of notice. But in the case of *De Berdt and Atkinson*, the drawer was not the real debtor; he was only security and was therefore entitled to notice. The case of *Sisson and Tomlinson* (see 15 East. 222) was decided by Lord Ellenborough on the authority of *De Berdt and Atkinson*; but in *Smith & Beckett*, (13 East. 189,) the court, with Lord Ellenborough, held that notice was necessary, in a case of known bankruptcy. In the case of *Kiddell and Ford*, (*Treadway*, 678,) this question was considered but not decided.

PAGE, vs. LOUD.

The application there was for a new trial, on behalf of the defendant, against whom a verdict had gone, when no notice of default had been given. The plaintiff had contended with success, in the circuit court, that the reputation of insolvency dispensed with notice. The constitutional court decided that it did not, and ordered a new trial. Mr. Justice Brevard, in his opinion, refers to two cases which have not been reported, (*Clark, vs. Adm'r. Minton, and Kiddell, vs. Peroneau,*) in which he states that it had been held that bankruptcy dispensed with notice. The first was tried before him and decided upon the peculiar circumstances of the case, as he states, all of which are not enumerated. It does appear however that notorious insolvency and absence from the state were proved. These are strong indications of fraud, and unless explained, are sufficient to vitiate the whole contract. I presume therefore, the plaintiff succeeded in that case, on the ground of fraud. The other case, *Kiddell and Peroneau*, was not tried before Mr. Justice Brevard, nor was he present when it was argued before the constitutional court; it does not appear that he was then on the bench. The accuracy of his report under such circumstances may very well be doubted. Had the whole case been fully reported, it is not improbable that it would appear to have been decided as the first was, on its peculiar circumstances; a phrase too frequently substituted for fraud. I can, therefore, attach no consequence to these cases and feel myself at liberty to decide the question untrammelled by authority.

The motion must be dismissed.

Bay, Nott, Gantt, Johnson, and Colcock, Justices, concurred.

Gadsden, for the motion.

Axson, contra.

SUSANNAH NEYLE, *ads.* CHISOLM & TAYLOR.

The balance of a factor's account, struck after the termination of dealings with his principal, does not bear interest.

THE plaintiffs were the factors of the defendant, and for several years advanced monies and furnished articles for plantation use and sold defendants cotton. On the 16th October, 1812, the account was stated, leaving a balance in favor of plaintiffs of \$203 85. Plaintiff's witness proved that the account had been rendered year after year; the account in question contained the accounts of several years, which had been rendered regularly and no objection made to them, although there was no admission of them. The accounts contained no charge of interest on any of the annual balances. The plaintiff claimed the last balance, with interest from the date when the same was struck. The judge stated his opinion to be, that interest could not be allowed; but the jury found for the plaintiffs the balance claimed, with interest from the first of October, 1812. A new trial is now therefore moved for, on the ground that the verdict, so far as it gives interest to the plaintiff, is against law and evidence.

The opinion of the court was delivered by Mr. Justice Richardson.

The single question is, whether a factor's account, for goods and money furnished to his principal, has any advantage over other open accounts and bears interest after the termination of their dealings. I can perceive no reason for it, and the custom has not prevailed. In their mutual dealings, the balance of credits is sometimes on one side and sometimes on the other; the advantage is reciprocal, and the goods furnished are sometimes paid for in cash or bought on a credit, and sometimes sold by the factor himself. True it is that there may be often specific advances which ought to bear interest, but we cannot on that account introduce an exception to the general rule, that open accounts bear no interest. See Treadway, 2 vol. 664. The motion is therefore granted, unless the plaintiff will remit the interest.

Colcock, Johnson, Gantt, and Huger, Justices, concurred.

Grimke, for motion.

Hunt, contra.

JOSIAH PAYNE, vs. NEWMAN KERSHAW.

Rule on Sheriff to shew cause why the proceeds of the sale of a schooner, made under execution in this case, should not be paid over; cause shewn, that the schooner was mortgaged to a third person, and condition broken, before judgment rendered: Rule discharged.

THIS was a rule upon the Sheriff, to shew cause why the proceeds of the sale of a schooner, made under the execution in this case, should not be paid over. The sheriff shewed for cause, that the defendant had mortgaged the said schooner to William A. Caldwell; that the mortgage bore date and had become absolute, before the judgment was obtained by plaintiff, and that the sheriff had been notified and proceeded against in due form, to make the money liable to said mortgage. The presiding judge ordered the rule to be made absolute: from which the sheriff appealed and now moved the constitutional court to reverse said order.

Clarke, for the motion. A mortgage of goods vests an absolute estate in the mortgagee and differs from a pawn. He may maintain trover, &c. 3 *Dall.* 144; 1 *Ves.* 361; 8 *Johns.* 96; *Pow. on Mort.* 3; 2 *Caines' Cas.* 202; 1 *Treadw.* 154. There is no such thing as an equity of redemption of personal property; this applies exclusively to real estates: the estate in chattels becomes absolute on the non-performance of the condition. *Pow. on Mort.* 338; 1 *Blac. Rep.* 145; 1 *Caines' Cas.* 71.

If the sheriff has sold property in which defendant in execution had no interest, he may retain the proceeds in his own hands, as an indemnity against his liability to the rightful owner. 15 *East.* 271-3; 1 *Bay*, 300; 2 *Burr*, 1005; *Cowp.* 419; *Bull. Ni. Pri.* 131; 1 *M'Cord*, 402. It is the duty and within the power of the court, to assist and protect the sheriff. 2 *Blac. Rep.* 1064; 1 *Con. Dec.* 145; *Ex parte, Stevens*, 1 *M'Cord*, 87.

The cases, *ex parte*, *Stagg* and *ex parte*, *City Sheriff*, are cases of mortgage on real estate; as to which, the equity of redemption exists; this is the subject of levy and sale, unlike the interest of mortgager in personal property. It may be said that

DUNCAN, *ads.* MARKLEY.

although there is not an equity of redemption, there is an equitable interest in the property. This at most however is a chose in action, which cannot be sold under execution. 9 *Johns.* 96; 4 *Com. Dig.* 121; 8 *East.* 407.

We ask no more than that the money may be suffered to remain in the hands of the sheriff, and the parties left to contest their rights in a suit at law.

Axson, contra. The plaintiff has a clear right to receive the money made on his execution; and the court ought not to interfere on the mere suggestion of the existence of adverse rights. The mortgage is not recorded, and the sheriff can in no event be liable.

The opinion of the court was delivered by Mr. Justice Huger.

If the schooner, sold by the sheriff, was not the property of the defendant in execution, the money made ought not to be paid to the plaintiff. The facts set forth in the return are sufficiently strong to render it doubtful whether the defendant had any right of property in the schooner. Under such circumstances, it is safer to leave the rights of the parties to be decided in an action, than to attempt to decide upon them on a rule against the sheriff. The motion in this case must, therefore, be granted.

Nott, and *Johnson*, Justices, concurred.

Clark, for motion.

Axson, contra.



JOHN DUNCAN, *ads.* BENJAMIN A. MARKLEY.

In an action on the case, for damages occasioned by a public nuisance, damages sustained since the bringing of the action, are not recoverable.

THE defendant kept up a dam or bank across little Cumming's creek, which is a public high way, to obtain water for his mill. In consequence of stopping the creek, the plaintiff sustained some special injuries to his mill, for which this action was brought. The witnesses on the part of the plaintiff proved

DUNCAN, *ads.* MARKLEY.

that damage had been occasioned to the plaintiff's mill by the dam erected by defendant, both before and after the bringing of the action.

The evidence was submitted to the jury by the court, with directions to find for the plaintiff damages, not only for the injuries done prior to the commencement of the action, but for such as had been sustained since. A verdict was accordingly rendered for the plaintiff. A motion was now made for a new trial on the following grounds, viz:

1st. That the damages were excessive and not authorized by the evidence; and

2dly. That for the injuries sustained after the commencement of the action, damages ought not to have been given.

The opinion of the court was delivered by Mr. Justice Huger.

On the first ground the appellant must fail, as the court can discover no error in the estimate of damages made by the jury, on the evidence submitted to them.

On the second ground, judgments generally refer to the situation of the parties at the commencement of the suit. If at that time the plaintiff had no cause of action, he must suffer a non-suit. It is then the defendant is informed of the wrong with which he is charged and the redress which is demanded. The declaration, which is but an amplification of the writ, must ~~must~~ set forth the form and manner of the injury, to enable the defendant to file the pleas necessary to his defence, and the judgment must correspond with the pleadings. If new matter however be introduced, subsequent to the pleadings, the defendant may be surprized, and the judgment of the court may not conform to the pleadings.

There are however exceptions to the general rule; but these exceptions occur only where the reason of the rule ceases, or the Legislature in its power has interfered. Of the last class, the action of trespass to try title and for damages, is one. Under the authority of the act creating the action, damages are given to the time of judgment, and no subsequent action can be supported for mesne profits. (*Sampter & Lehie,*

DUNCAN, *ads.* MARBLEY.

Treadway, 102.) Of the first class of exceptions, is the action of assumpsit, brought on contracts for the payment of money with interest. In such actions, the plaintiff is always permitted to recover interest to the date of the judgment; but here the interest accruing after action commenced is the certain legal result of the contract on which the action is brought, and therefore the defendant cannot be surprized. In these cases the plaintiff would be without remedy, were not the mesne interest included in the judgment. For action could not be brought for the interest, after satisfaction had for the promise. (2 *Burrows*, 1087.) But in an action on the case for special damages for a public nuisance, the judgment must conform to the general rule. It is not to be forced within the reason of the exceptions. There is no necessary, certain connexion between the injuries sustained before and after the commencement of the action. It does not follow, because a special injury has been sustained at one period of time, that another is to follow at any interval or at all. If therefore the plaintiff be permitted to give evidence of an injury sustained subsequently to the bringing of the action, the defendant may be surprized; for he may not know of the injury sustained, nor be prepared to defend himself. Nor is it necessary to the justice of the case, for the plaintiff may bring his action, *toties quoties*, he may sustain an injury. (3 *Blkst. Comm.* 220. 2 *Espinasse's N. P.* 269.) In the case of *Robinson and Bland*, (2 *Burrows* 1087,) Lord Mansfield observes that "it is agreeable to the principles of the Common Law that whenever a duty has occurred pending the writ, for which no satisfaction can be had by a new trial, such duty shall be included in the judgment to be given upon the action already pending." And in *Robert Pilford's case*, (10th *Coke* 117,) it is said that in personal actions, damages shall be recovered only for the wrong done before the writ brought; but in real actions, he recovers damages pending the writ. The motion for a new trial must, therefore, be granted.

Nott, Colcock, Gantt, Johnson, and Richardson Justices concurred.

Petigru & King, for motion.

Hunt & Kennedy, contra.

MATTHEW J. PAYNE, *ads.* ROBERT ROBINSON.

Trover. After the execution of the treaty ceding Florida to the United States, and its ratification by the government of the United States, but before its ratification by Spain, the plaintiff, a British subject, introduced slaves into Florida and put them into the possession of one H. The slaves broke into insurrection and committed various outrages. An officer of the United States' army, at Amelia Island, at the request of the wife of H. (who was absent) and by permission of the Spanish governor to enter Florida for the protection of the inhabitants, sent a party who seized the slaves, and they were detained in the custody of defendant till ordered to be given up by the government. While in custody one of the slaves, attempting to escape, was shot by a sentinel. Held that the seizure and detention were excusable and defendant not liable.

THIS was an action of trover, against an officer of the United States' army, to recover damages for the detention of ten negroes.

It appears from the evidence, that in the spring of 1820, a British schooner called the Springbird, from Jamaica, came into the river St. John's, in East-Florida, with seventeen negro slaves; that they were of bad character, and understood to be convicts, who had been shipped for their crimes; what became of seven of them, no body knew or would give any evidence; that the other ten were either sold to Mr. Houston, on Talbot Island, or were engaged to be sold to him, and were in March, 1820, working on his plantation and under his control; that while on Talbot Island, the slaves rose one night, broke open a store-room and plundered from it provisions, arms and ammunition; that Mrs. Houston (Mr. Houston being absent) requested a gentleman present to apply for assistance at Amelia Island, where there was then a United States' garrison; that he went the next day to Fernandina and requested Col. Bankhead, then in command; to send a force to take charge of the negroes on Talbot Island; that Col. Bankhead had before this been applied to by settlers in Florida, to the north of the St. John's, to afford them protection, and particularly by Judge Low, who enclosed a letter from Governor Coppinger, authorizing the interference; that in that part of Florida, there could scarcely be said to be any government, there being no magistrates or courts of justice

PAYNE, *ads.* ROBINSON.

in the exercise of authority: that negro slaves had been introduced into Georgia, through Florida, in 1817 and 1818; that Col. Bankhead having also been informed, not long before the application from Talbot Island, that a company had been formed to introduce slaves into Georgia, thought this an occasion for complying with General Gaines' order of the 22d May, 1819, relative to attempts on the southern frontier to introduce negro slaves into the United States, and detached Lieutenant Griffiths with a competent force to act under it, and also to protect the inhabitants of Florida from any outrages which the slaves might commit; that Lieutenant Griffiths proceeded to Talbot Island and took away the ten negroes on the day of March, 1820; that he brought them to Fernandina, where Captain Payne was then in command; that while in custody they were maintained at the expense of the United States, and one of them having forcibly endeavored to make his escape was killed by a sentinel on duty; that Captain Payne having refused to deliver them up until instructed by his superior officer, detained them until upon the application of *Belton Copp*, an attorney at law, to the Secretary at War, they were ordered to be restored on the payment of their expenses, which having been complied with the nine survivors were on the 8th Sept. 1820, delivered up by Captain Payne. It also appeared from the evidence, that Robinson, the plaintiff, was a British subject from Jamaica; that he had been a merchant and afterwards a seafaring man; that he applied to Governor Coppinger and got permission from him to bring negroes into Florida; that the plaintiff had no landed property in Florida, but was in treaty for the purchase of lands, and that Mr. O'Hara, the witness, had given him permission to settle on any of his lands.

The defendant contended that the plaintiff had not established any such property, possession or right of possession, as was necessary to enable him to maintain the action, and that the seizure and detention was justified or excused by the political state of that part of Florida from which the slaves were taken, and was authorised by the application of the inhabitants and the

PAYNE, *ads.* ROBINSON.

Just suspicions of the officer, and under the order of General Gaines.

The judge charged the jury that the entry into Florida with an armed force was unjustifiable, as no government has a right to interfere with the territorial rights of another, but that the officers seizing and detaining, were perfectly excusable; that there was nothing lawless or officious in their conduct, which indeed was laudable and was called for by the necessity of the case, and that therefore they were not answerable in damages. The jury found a verdict for \$609,68, including interest. The defendant moved for a new trial on the following grounds.

1st. That from the condition of Florida at that time, it was no violation of the Spanish authority to seize the negroes, and therefore, under all circumstances, it was a justifiable act.

2nd. That from the evidence and the judge's opinion it was an excusable act, and the damages should have been nominal, and were therefore contrary to evidence.

Petigru, for motion. To authorize the plaintiff to recover, he ought to prove possession or property in himself. The possession was in Houston, and so far as the proof goes, they were convicts from the West Indies.

The presiding judge supported the counsel for defendant in the view that the state of the country was such as to excuse defendant's act. In legal effect, there is no difference between an excuse and a justification; all the difference is in the manner of pleading. Condemnation of one criminally accused is only justifiable on full proof; but seizure and detention are excusable when there is probable cause. *Mayson Rep.* 27, 102; 7 *Cranch* 339.

The officers had explicit instructions to use their efforts to suppress the slave trade, and the manner and circumstances of the introduction of these slaves, was calculated to induce the belief that the plaintiff had violated, or was about to violate the law.

The acts of Congress of 1807 and 1819, authorize naval and military officers to seize vessels having slaves on board.

PAYNE, *ads.* ROBINSON.

The government is not bound to wait until the laws are violated, but may anticipate the contemplated act of violation, when circumstances justify the belief that it is contemplated.

Grimke, contra. Although the negroes were in the possession of Houston, yet according to his own evidence, his possession was the possession of plaintiff. He left them in Houston's possession, and according to the strictest rule, they were *prima facie*, his property. The action of trover is founded technically on plaintiff's possession.

There is no doubt that defendant did the act which is complained of, and the plaintiff was entitled to a verdict for something, unless defendant had pleaded and proved a justification. Circumstances of extenuation or excuse could only be used to lessen the damages and were exclusively for the jury.

Was the taking of the negroes justified by the circumstances? When the act of congress for preventing the slave trade was passed, the U. S. had not the power, and it could not have been intended, to interdict the importation of slaves into Florida. Until the surrender of the territory under the treaty, the United States had no power over it, so far as territorial jurisdiction was concerned. The plaintiff was a British subject, and government had no personal jurisdiction over him, and consequently could not authorize the act; and the authority of government cannot justify the officer. 2 *Cranch*, 170, 179.

The act of 1807 has no application to this case. The powers delegated to the president by that act, are confined to vessels within the jurisdiction of the United States, and to those hovering off the coast, with apparent intention to land; and to vessels belonging to citizens of the United States, found on the high seas with slaves on board. The only case provided for by the act, which bears any analogy to the present, is that of hovering on the coast; and the fact that these slaves were landed in Florida, and contracted to be sold there, shews that this case did not exist. The act of 1817 only provides for cases where the vessels employed in the slave trade belong to citizens or residents of the United States; which has clearly no application to the present.

PAYNE, *ads.* ROBINSON.

The plaintiff's demand was for the expenses paid to the officer, as a condition of delivering up the negroes, and for the negro shot. It is objected that money paid for the subsistence of the slaves while in defendant's possession, cannot be recovered in the action of trover. There is no doubt but a special assumpsit would lie to recover it back; but it does not follow that it may not be recovered in trover. If the damages sustained be the consequence of the original injury, (as in this case) they may be recovered in this form of action.

Gadsden, in reply. To sustain his action, the plaintiff must prove both property and possession, or the right of possession. 2 *Phil. Ev.* 118; 14 *Johns.* 353, 7 *T. R.* 12; 18 *East*, 609. He had sold to Houston: Houston said he had engaged to purchase them, provided he could pay for them by a given time, which had not arrived. They were in Houston's possession, and at work on his plantation; he first applied for the return of the slaves and was with Robinson when they were returned.

The defendant had a right to take them. There was no violation of sovereignty, for he was invited by the Spanish authority. A state may enforce an ordinance beyond its own jurisdiction. The peculiar circumstances of the province justified the measure. It actually belonged to the United States by treaty; the treaty was to be ratified within six months, it was ratified, and the ratification has relation to the time of its execution.

If the Plaintiff's object was to bring these slaves within the United States, they might be lawfully seized even in Florida, and no one could complain but the Spanish government. The circumstances afforded reason to believe that such was his object; and if there was probable cause for seizure, it will excuse.

The opinion of the court was delivered by Mr. Justice Huger.

The political situation of Spain, anterior to 1819, was disturbed and revolutionary. The Spanish empire was falling to pieces, and the mother country was unable to preserve order and peace in her colonies. The contiguity of East Florida to the United States imposed on the general government the duty

PAYNE, *ads.* ROBINSON.

of adopting measures for the protection of our southern frontier. A lawless mob having possessed themselves of Amelia Island (the northern extremity of East Florida) put at defiance the constituted authorities of the province, and threatened the peace of the United States. Under these circumstances, the general government thought proper to take military possession of that part of Florida which was immediately contiguous to Georgia. This precautionary measure gave no umbrage to Spain. She appears to have been satisfied that the United States acted in good faith. Subsequent to this, in February, 1819, the treaty of session was signed at Washington, and ratified by our government. Provision was made in this treaty for a ratification by Spain in six months after its date. This however was not done until October, 1820; during this interval the government of Florida and the magistrates were unable to afford protection to the inhabitants living to the north of the St. John's river, they were referred to the United States' army for protection, accompanied with an acknowledgment of their imbecility and a request to the officer commanding the United States' troops, that he would afford protection. The power of Spain had ceased and that of the United States had commenced; it was therefore incumbent on them to afford protection, for wherever sovereign power exists there have the governed a right to look for protection. A government can only act by its agents, and the agents of the United States in Florida were the army: the army therefore was bound to afford the protection required. It certainly did not lie with the plaintiff, who was a foreigner to both governments, to dispute an authority sanctioned by both.

It is difficult to imagine a case which could present a stronger claim to the protection of the sovereign power than the one before the court. A foreigner gets into the country, with a cargo of convicts, under the pretence of settling there. He sells his cargo, in opposition to the known laws and policy of the province, as well as of the United States. The convicts, as he must have expected, raise the standard of insurrection, alike dangerous to Florida and Georgia; they arm themselves,

NICHOLS, vs. ARTMAN.

steal, rob and threaten the destruction of the weak and defenceless, and then he complains that the power in the exercise of sovereignty interfered to prevent the consummation of mischiefs, against which humanity alone afforded a sufficient authority to act, and which interference the laws of nature and nations imperatively demanded. I can see no ground on which the plaintiff can recover; the interference on the part of defendant was authorised by the government. No more force was used than was sufficient to quell the insurrection, and their detention lasted no longer than the government supposed necessary to the occasion. The unfortunate accident which happened was the effect of an attempt to escape on the part of one of the prisoners for which the defendant is not answerable.

The motion must, therefore, be granted.

Bay and Johnson, Justices concurred.

Gadsden and Petigru, for motion.

Grimke, contra.

ISAAC NICHOLS, *Endorsee*, vs. PETER ARTMAN, *Drawer*.

The endorser of a promissory note is a competent witness to prove in an action against the drawer that it has been paid.

THIS was a case tried before the Recorder of the City Court in July Term, 1823. Assumpsit upon a promissory note. Pleas, non-assumpsit and discount.

THE plaintiff proved the hand writing of the defendant and of the endorser, and here rested his case.

The defendant's counsel offered Nelson, the endorser, as a witness to prove the payment of the note. This testimony was rejected. The defendant's counsel then went into evidence to prove his discount, which consisted in a demand by the defendant against one John Riley.

Mr. Petigru, the plaintiff's counsel, was then examined by the defendant. Mr. Petigru, said that this note was conveyed to the plaintiff by Mrs. Nichols, for her use and benefit; that the assignment was not made by Mrs. Nichols until after the note

NICHOLS, vs. ARTMAN.

became due, but whether the plaintiff had been in possession of the note before the execution of the assignment, the witness was ignorant.

The defendant's counsel then moved for a non-suit, upon the ground that the plaintiff was the assignee and not the endorsee of the note; that therefore he could not declare as endorsee, but was bound under the act of Assembly to have brought his action as assignee of the note. The motion was overruled. Mr. Riley's examination under a commission was then read. He said that he had loaned the money for which this note had been given; that the money belonged to Mrs. Nichols and he had loaned it as her agent; that the note was originally for \$500; but by renewals had been reduced to \$

Mr. Smith, examined by the defendant's counsel, said, that in 1818 or 1819, he had paid Mrs. Nichols \$1200, that some time afterwards, Mrs. Nichols told him she had delivered the money to Mr. Riley, who was to loan it to a Mr. Keckeley. Upon being cross-examined, Mr. Smith said, that he understood that Mr. Riley was to loan the money to Mr. Keckeley on account of Mrs. Nichols.

The defendant's counsel then offered his discount, alleging that it had been sufficiently shewn that Riley loaned the money to the defendant, not as the agent of Mrs. Nichols but in his own name and on his own account; therefore that any demand which the defendant had against Riley, was a legal set off to this action. The recorder decided the discount to be inadmissible, as being not merely unsupported by the evidence, but directly contradicted by it. The case was submitted to the jury, and they found a verdict for the plaintiff. Notice was given that a new trial would be moved for.

For the motion, were cited; 1 *Phil. Ev.* 34; 1 *Con. Dec.* 277. Against the motion. 1 *M^c Cord*, 552; 2 *M^c Cord*, 214.

The opinion of the court was delivered by Mr. Justice Nott.

A statement of this case will be found in the recorder's report; and the only ground which it is necessary to notice is that of having refused to permit the endorser of the note to be sworn

ORDINARY, vs. STEEDMAN. SAME, vs. STEVENS.

as a witness. There is no doubt but that he was a competent witness, and if the motion depended alone upon that question, it certainly would prevail. That point has been settled in the case of Smith & McDow. But the court concur in opinion with the recorder, that the testimony which he was about to give, (which was to establish the set off offered by the defendant) was inadmissible for the reasons therein stated. The motion therefore must be refused.

Bay, Johnson and Huger, Justices concurred.

Gantt, Justice, dubitante.

THE ORDINARY OF CHARLESTON DISTRICT, vs. C. J. STEEDMAN, *Ex'or of B. Cudworth.* SAME, vs. DANIEL STEVENS.

The lapse of twenty years will raise the presumption of performance of any other condition of a bond, as well as that for the payment of money.

THE above cases are presented upon one brief, because they were brought upon the same bond and depend upon the same evidence; being actions of debt on an administration bond, signed by John Moncrief (who had taken the administration of the estate of one John Gaborial,) and also, by Daniel Stevens and Benjamin Cudworth above named; said bond bearing date, 19th March, 1785, in the penalty of £2000. The condition of bond was, that the said administrator should make or cause to be made a true inventory of said estate and exhibit the same into the Ordinary's office of this district, at or before the 19th June then next ensuing, and well and truly administer the same, according to law; also that he should make or cause to be made a true account of his administration, at or before the 19th March then next ensuing; and that the residue found remaining on said account (when examined and allowed by the Ordinary) he should deliver and pay, pursuant to the act of Parliament of 22nd and 23d, Charles 2nd, entitled "an act for the better settling of intestate's estates." The defendants cravedoyer of the bond and pleaded performance; the plaintiff

ORDINARY, vs. STEEDMAN. SAME, vs. STEVENS.
 replied non-performance and set forth breaches in most of the particulars mentioned in the condition.

The plaintiff proved by Mr. Armstrong, clerk of the Ordinary, and Mr. Laval, Secretary of State, that diligent search had been made in their respective offices, and that no inventory whatever of the estate of said Gaborial had been returned into either office, and that no record of any account of the administration of said estate could be found in said offices; that the record of the granting letters of administration of said estate to said Moncrief, were all that appeared.

Upon the adduction of the original bond and the foregoing testimony, the plaintiff contended that he was entitled to recover the amount of the penalty; that *ex necessitate rei*, all the testimony that the nature of the case admitted was produced; that the administrator, Moncrief, having possessed himself of the whole of said estate, and being the only person acquainted with the extent and value, might or might not have returned an inventory thereof, as the same might have exceeded or fallen short of the penalty of the bond; being interested, if the value of the estate were less than the penalty, to make a return; but otherwise, if it exceeded it. The proof of his not having done so, raised a very strong presumption, (uncontradicted by any counter proof or presumption,) that the nett estate was worth more than £2000.

The presiding judge charged the jury that in making up their verdict, they might legally regard the lapse of time since the date of the bond as evidence of performance of its condition, and also charged generally against the plaintiff. The jury found a verdict accordingly for defendants, from which the plaintiff appealed and moved for a new trial:

1st. Because upon the evidence and the law of the cases, plaintiff was entitled to a verdict for £2000, the penalty of the bond.

2nd. Because under the plea of performance, the lapse of time could not avail the defendants, there being no plea of *solvit ad diem*.

ORDINARY, *vs.* STEEDMAN. SAME, *vs.* STEVENS.

3rd. Because there was no proof whatever of performance by defendants, but on the contrary, clear proof by the plaintiff of breaches of the condition of the bond and damages sustained, which entitled the plaintiff to a verdict.

4th. Because the verdict was entirely without evidence to support it and against both law and evidence.

The opinion of the Court was delivered by Mr. Justice Nott.

The only question in this case is, whether the judge below was correct, in instructing the jury that the performance of the covenants contained in the condition of the bond might be presumed from the lapse of time. It is now well settled in this state that the lapse of twenty years is, *per se*, conclusive evidence of the payment of a bond conditioned for the payment of money; and whether a bond is to be discharged by the payment of a sum of money, or by doing any other act, can, in my view, make no difference in that respect. The presumption is as strong, that the act has been performed in one instance, as that the money has been paid in the other. Indeed, I think it is stronger, particularly in the case of bonds of a public nature. The performance of the duty does not affect his interest nor impair his estate like the payment of money. His interest therefore, consists in the faithful discharge of his duty. Neither are persons interested in the distribution of an estate, so much disposed to give indulgence to one who has the administration of it, as those to whom money is due, are to a person who is bound to pay out of his own estate. Besides, it is a maxim of law, "interest reipublicæ ut sit finis litium." There never would be an end to litigation, if any old paper sleeping in the desk of a public officer, may, after a lapse of nearly forty years, be dragged from its bed of repose, to disturb the peace of a family which has never derived any benefit from it; and may perhaps not even know of its existence.

The presumption to be sure might have been rebutted by the evidence of any fact which went to shew an existing demand; but no such thing was attempted. Mr. Moncrief, the administrator, has been dead but a few years, yet no account of his has

BARKSDALE. vs. TOOMER.

been shewn, recognising his liability. No claim has been interposed by those entitled to the estate, if there is any. No enquiry has been made by creditors or others interested in the administration. It is unreasonable to suppose that those who had so deep an interest in investigating the subject, would have slept over their rights for such a length of time, while the administrator was in the quiet enjoyment of what belonged to them; and it would be still more unreasonable now, when he is dead and gone, to suffer a dormant claim which has grown grey with age to be resuscitated against his securities, who it cannot be expected have the means of defending themselves against it. I am of opinion, therefore, that the motion ought to be refused.

Bay, Colecock, Johnson, and Huger, Justices concurred.

Clark, for motion.

Pepoon, contra.

*The Ex'ors. of GEORGE BARKSDALE, vs. DR. A. V. TOOMER.*

Deed to defendant describes the land as "that plantation, or tract of land, situate in Christ Church Parish, about eight miles from Hibben's Ferry, now in the possession of the said A. V. T." (the defendant) "containing nine hundred and eighty-six acres, be the same more or less." On resurvey, the tract was found to contain about one hundred acres less than the quantity expressed in the deed. In an action on the bond given for the purchase money, it was held that defendant was not entitled to a deduction for the quantity of land deficient.

THIS was an action of debt on bond for the purchase money of a tract of land. The defence was a deficiency in the number of acres, for which the defendant claimed a deduction. Whether a deduction ought to be allowed or not, depended upon the construction of that part of the deed containing the description of the land, which was in the following words: "all that plantation or tract of land, situate, lying and being in Christ Church Parish, about eight miles from Hibben's ferry, now in the possession of the said A. V. Toomer, containing nine hundred and eighty-six acres, be the same more or

BARKSDALE, *vs.* TOOMER.

less." Upon a resurvey, there appeared to be about an hundred acres less than is expressed in the deed. The presiding judge instructed the jury that the defendant was entitled to a deduction for the value of that quantity of land, and they found a verdict accordingly. This was a motion for a new trial, on the ground of misdirection of the court.

The opinion of the Court was delivered by Mr. Justice Nott.

Every deed for the transfer of land must contain some description, sufficiently certain to let it be known what is intended to be conveyed. Land may be so described by metes and bounds as to control the number of acres; or it may be so described by name or character that the metes and bounds will be unnecessary, and so that the number of acres mentioned may be considered only as a part of the description; or the quantity may be expressly warranted. But in every case, we must look to the whole description, and that part which is the most certain must prevail. Now the question is, whether the warranty in the present case extends to the quantity of land sold, or to a well known plantation in gross, without regard to the number of acres. It is described as "all that plantation or tract of land, situate, lying and being in Christ Church Parish, about eight miles from Hibben's ferry, now in the occupation of the said A. V. Toomer." If it had stopped here, there can be no doubt but that the description would have been sufficiently certain, and there can be as little doubt that the warranty would not have extended to any particular quantity. Nor can the addition of the other words make any difference; the words are "containing nine hundred and eighty-six acres, be the same more or less," and what is that more than to say, "all that plantation whereon the said A. V. Toomer now resides, whatever may be the number of acres." The plantation was well known to the defendant, for he was then in the occupation of it, and probably knew with sufficient certainty the number of acres that it contained, or at least of all that was of sufficient value to enter into the consideration of the purchase.

BARKSDALE, vs. TOOMER.

It is thought that this opinion conflicts with the decisions which have already been made in this court on the subject. But I think it will be found that they all steer clear of the question now before us. The first is the case of *Gray and the Executors of Handkinson*, 1 Bay, 278. In that case a plat was exhibited at the time of the sale, representing a mill seat as belonging to the land, which it appeared was the principal object of the purchase. The court allowed the defence, on the ground of misrepresentation, by which the purchaser had been deceived and the great object of his purchase entirely defeated. The next was the case of the *State, vs. Gaillard*, 2 Bay, p. 11, which was decided precisely upon the same principles. The court say "whenever there is a failure of consideration, a misrepresentation or concealment of material circumstances, it will vitiate the contract in toto, or entitle the party injured to such reasonable abatement in the price of the thing sold, as will compensate him for the misrepresentation." In the case of *Sumpter and Welch*, 2 Bay, 558, the plaintiff had warranted a certain number of acres. Upon a resurvey there was found to be a considerable deficiency, for which it was held that the defendant was entitled to a deduction. In the case of *Adams and Wilie*, (1 Nott & M. Cord, 78,) there was not only a misrepresentation at the time of the sale, but the land was so described in the deed as to admit of no other construction but that the warranty extended to the precise number of acres. The case of *Tunno, and Fludd*, 1st M. Cord, 121, is the last that I shall notice. In that case a plat of resurvey was exhibited, representing a tract of land embraced within certain lines of an ascertained length and containing a certain number of acres. Upon a resurvey it was found that the surveyor had made a mistake in some of the lines, by which the purchaser had been actually deceived in the quantity of land which he supposed he had bought. This is the case which it is said runs on all fours with the case now under consideration. But where is the analogy? In the first, the purchaser had bought a tract of land by specified metes and bounds. The evidence by which he might ascertain the quantity was laid before him. Any person who

BARKSDALE, vs. TOOMER.

could multiply two lines together and divide the product by the number of square feet in a square acre could have calculated the number of acres. But the evidence itself was delusive, and when he discovered the mistake, (I will not call it fraud, because I presume it was unintentional) the courts held that he was entitled to redress.

It is said that the words "more or less," mean nothing more than the mere fragments that may happen to be over or under a specified number of acres. It is true that sometimes they mean but little; at other times they mean nothing. But they may mean much or little, according to the other words of description with which they are associated. Thus if a person should sell a lot of land in Charleston, described as "a parallelogram measuring two hundred feet on Broad-street, and one hundred feet on Meeting-street, containing twenty thousand square feet, more or less;" those words would have no meaning, because the dimensions being given and the quantity correctly stated, the result would be precisely the same even if those words were omitted. But suppose such a lot had been represented as containing ten thousand or thirty thousand square feet, then they would serve to remove the ambiguity, and to show that the land contained within those lines and that only was to be conveyed, whatever the quantity might be. But suppose upon actual survey the line on Broad-street should be found to be but one hundred feet long, and that upon Meeting street only fifty feet, the words "more or less" could not screen the seller from liability for the deficiency; and such was the case of Tunno and Fludd. But suppose a person to sell to A. B. the lot in Charleston "at the corner of Broad and Meeting-streets, whereon the said A. B. now lives, containing twenty thousand square feet, more or less," I apprehend the purchaser could have no recourse to the seller, if there should happen to be a deficiency in the number of square feet; and such I consider to be the case now under consideration. There was no misrepresentation or deception; the defendant purchased the plantation on which he was then living, and with which he must be presumed to have been well acquainted, for which he

BARKSDALE, vs. TOOMEN.

promised to pay a gross sum, whatever the number of acres might be, more or less. I am of opinion therefore, that he is not entitled to any deduction, and that a new trial ought to be granted.

Colcock, and Johnson, Justices, concurred.

CONSTITUTIONAL COURT,

COLUMBIA,
MARCH TERM, 1824. }

JUSTICES PRESENT.

C. J. COLCOCK,	A. NOTT,
R. GANTT,	D. JOHNSON,
J. S. RICHARDSON,	D. E. HUGER.

JOHN M'FALL, vs. WM. SHERRARD.

One D. being indebted to both Plaintiff and Defendant. conveyed the land in dispute to Defendant in part payment of his debt, at its full value, pending a suit in Equity against him by Plaintiff; who afterwards obtained a decree and issued execution, upon which the land was sold and purchased by Plaintiff. The deed to Defendant was not recorded within six months, as required by law, but Plaintiff had notice of it before his purchase, and before obtaining his decree. Held that the actual notice supplied the omission to record within six months, and that Defendant's deed was valid as to Plaintiff

Trespass to try titles to land. Both parties claimed the land in dispute under John Dickie. He was indebted to both, and on the 10th February, 1819, the plaintiff filed a bill in the court of equity against him for an account. The decree of the court was pronounced on the 17th June, 1820; execution lodged in the Sheriff's office, 30th June; levy 2d August;

M'FALL, vs. SHERRARD.

sale, 5th September following. Plaintiff was the purchaser, and the Sheriff's deed to him bears date the 13th Sept. 1820.

On the 21st December, 1819, Dickie conveyed the land to the present defendant in part payment of his debt and at its full value; but the deed was not recorded until the 26th August, 1820. It appeared in evidence, that although the deed was not recorded, the plaintiff had notice of its existence before the date of his decree and within six months after its execution; and the question was, whether the deed for want of recording within the time prescribed by law, was not void as to the plaintiff. The presiding judge was of opinion, and so instructed the jury, that it was not, and they found a verdict for defendant. A motion was now made for a new trial on the ground of misdirection in this particular.

The opinion of the court was delivered by Mr. Justice Johnson.

The rights of the parties in this case depend on the construction of the act of 1785, *Pub. Laws*, 381, 2. Amongst other things, this act provides that all deeds for lands, between persons resident in the state, as was the case of these parties, shall be recorded in the clerk's office of the district in which they are situated, within six months after the execution thereof; and it is declared that if any such deed shall not be recorded within that time, such deed shall only be valid between the parties themselves and their heirs, "but shall be void and incapable of varying the right of persons claiming as creditors or under subsequent purchases, recorded in the manner before prescribed."

It is obvious that the mischief intended to be remedied by this act, was the facility with which frauds might be practised by double conveyances, and the remedy provided, is recording the deeds in the clerk's office, thus constituting a common place of deposit for all the land titles in the district, to which all may resort for information, and thus protect themselves from such practices. But if this information is attained by other means, the object of the act is accomplished, and on the principle that when the reason ceases, the law also ceases, the law becomes

M'FALL, vs. SHERRARD.

inoperative, and its sanctions do not attach. The case of *Tart vs. Crawford*, 1 *M'Cord* 265, proceeds on this principle. In the construction of this act, the court there says, that although a prior deed has not been recorded, yet if a subsequent purchaser has notice, he is not protected; and such is now the received rule, and whether we refer to the principle or to its application, it follows that notice is a substitute for, and has the effect of recording.

The plaintiff claims protection under this act in the double character of subsequent purchaser and creditor, and we will proceed to examine them with reference to these rules. and

1st. As a subsequent purchaser. Dickie conveyed to the defendant on the 21st December, 1819. The plaintiff had notice before the 17th June, (the date of his decree) within six months after the execution of the deed, and long before he became the purchaser. The case falls therefore precisely within the rule laid down in the case above cited, and he cannot be protected in that character.

2dly. As creditor. I do not comprehend precisely what is intended by the term, "claiming as creditors," as used in the act. It may be doubtful whether they do not apply exclusively to such as claim by some lien on the land, as mortgagee, &c. but I do not think it necessary to consider that matter in this case. Give to them the most liberal and extended interpretation in favor of creditors, and, as to this case, the same consequences must follow.

If we examine into the policy of the act, it is obvious that it was the intention of the legislature to protect only that class of creditors who had trusted the ostensible owner on the credit of his property, by imposing a forfeiture on him who by keeping secret his titles, should enable the debtor to obtain a credit by holding out false colors. This policy could not extend to cases where the debt was contracted before the sale. The debtor might sell notwithstanding, and the creditor would thereby lose his security, and the purchaser would be without motive for concealment.

SLACK, vs. LITTLEFIELD.

The plaintiff's demand against Dickie, was prior to the sale to the defendant. His bill was filed in February, 1819, and the defendant's deed bears date in December following, and if this construction be correct, the deed is not void as to him.

Again. It will not be denied that if the deed had been recorded within the six months, that it would have been valid to all intents and purposes; and according to the rule deduced from the case of *Tart, vs. Crawford*, that notice is a substitution for, and supplies the place of recording, it is in effect, as to the plaintiff, a recording of the deed, and he has nothing to complain of, as all the purposes of the act are fully answered. Motion refused.

Johnson, Huger, Gantt, and Richardson, Justices, concurred.

SLACK, vs. LITTLEFIELD.

Trover for Cotton. The proof of conversion relied on was, that defendant having lost cotton, and having cause to suspect that it was in plaintiff's possession, obtained a search warrant and was in company with the constable who seized cotton, answering the description of defendant's, in plaintiff's possession. No proof of a demand on defendant, or that he had been in possession of the cotton seized. Verdict for defendant, and new trial refused.

TROVER for sixty pounds of picked cotton. The defendant alleged the loss of a quantity of picked cotton and obtained a search warrant. The constable, with the defendant and others in company, went to the plaintiff's house and found there about sixty pounds of picked cotton, which defendant claimed as his own. The cotton lost by defendant had been packed, and was taken from his factory on Tyger river, and the witnesses all agreed that the parcel found at plaintiff's had the appearance of having been packed, and one witness swore that it smelt of the oil used in the factory.

The plaintiff's clerk (called by himself) proved that he, the witness, had a few nights before purchased twenty-four

SLACK, *vs.* LITTLEFIELD.

pounds of this cotton from a negro, belonging to Mr. Partrain, who had a written permit; but the permit was not produced. The plaintiff had purchased the balance in his absence, but from whom he did not know. (The cotton appeared to be all of the same quality.)

There was no evidence that the cotton was ever in defendant's possession, or that plaintiff had made a demand on him, and the facts relied on to prove the conversion, were that defendant had procured the warrant and was in company with the constable when he carried it away.

Verdict for defendant—and motion for a new trial, on the grounds that property in the plaintiff and conversion by the defendant were sufficiently proved.

The opinion of the court was delivered by Mr. Justice Gantt.

To maintain an action of trover, it is necessary that it should appear: 1st. That the plaintiff had either an absolute or special property in the goods which are the subject of the action, at the time when they came into the possession of the defendant, who has converted them; and 2dly. that the defendant has been guilty of a wrongful conversion. From the evidence which this trial furnishes, I am inclined to think that no right of property was established, in support of the plaintiff's claim to the cotton, but on the contrary, that the presumption of right arising from possession merely, was rebutted by the evidence of his having procured a part from a negro, without showing at the same time that the negro was duly authorised to sell him the cotton.

To sustain the allegation of a conversion by the defendant, possession in the defendant himself must be proved. *Bull, N. P. 44; 2d. Selwyn, 1303*—no such evidence was offered. The goods were taken possession of in virtue of a search warrant, obtained by the defendant, and not without probable cause that the plaintiff's possession was unlawful. The court are unanimous in the opinion that a new trial should be refused.

Richardson, Nott, and Huger, Justices, concurred.

WILLIAM BIRCHMORE, Sen. ads. EDWARD BROUGHTON.

The sheriff's deed to plaintiff conveys "all that plantation or tract of land," belonging to defendant "in Sumter district." Defendant had several tracts of land in Sumter district. Held that the deed was void for uncertainty, and that the defect could not be supplied by the sheriff's advertisement, or his oral testimony, to shew what land was levied on and meant to be conveyed.

ACTION of trespass to try title. The plaintiff claimed under the sheriff's deed; he produced a judgment against Birchmore, but not the execution under which the sale was made. He proved an ineffectual search for it. The sheriff was sworn and examined on the part of the plaintiff, who proved that he had the execution in his hands, at the time of the levy; that his levy book was lost, but that he had levied upon the tract on which defendant lived; *not the mill tract*. He spoke very positively. The sheriff's deed was then offered—it described the land sold, thus, "*all that plantation or tract of land lying in Sumter district.*" The surveyor then produced his plat, which was found to be a survey of the *mill tract*. The sheriff's advertisement was next offered, to shew what land was levied upon, and what land the deed *meant to describe*. Defendant objected to the introduction of the deed for these purposes, but was overruled. A motion for a non-suit was also overruled: Plaintiff bought the land for fifty dollars at the sale. The mill tract, which he contended was the land purchased, had upon it a saw and grist mill. Verdict for plaintiff, the land and one cent.

The motion for a non-suit was renewed on appeal, and if refused; a motion for a new trial was substituted:

1. Because the sheriff's advertisement ought not to have been received in evidence to explain the deed:

2. Because the description of the land in the deed was so indefinite that it could convey no right.

The opinion of the Court was delivered by Mr. Justice Gantt.

The plaintiff founds his claim under a deed of conveyance from the sheriff of Sumter district, and the only description given of the premises intended to be conveyed is, "all that

BIRCHMORE *ads.* BROUGHTON.

plantation or tract of land lying in Sumter district." The counsel for the defendant, considering the deed void, on account of the generality of the description, moved for a non-suit; but was overruled, and the plaintiff had a verdict. The same ground is now insisted on.

In a deed, the premises ought to comprehend the certainty of the lauds or tenements to be conveyed, *4th Comyns Dig.* 162; and a grant shall be void if it be totally uncertain; as if a man grant as many trees as can be spared in his manor, or if he grant £10 per annum, parcel of his manor, without other certainty, *Comyns* 302. In both these instances, there is at least as much, if not more of certainty in the description, than is furnished by the present deed; but inasmuch as it does not appear what trees can be spared, or from what parcel of the manor the grant of £10 per annum is to issue, such conveyance would be void for uncertainty.

Birchmore, the defendant, owned several tracts of land lying in Sumter District; the Sheriff conveyed one.—It would be as impossible to say, from the description in the sheriff's deed, which of the *tracts* of land of Birchmore was intended, as in the instance quoted, to say what trees or what parcel of the manor was intended. Hence arose the necessity in this case, of resorting to evidence extrinsic to the deed, to ascertain and identify the land.

The sheriff was called upon to give oral evidence of that which ought to have been shewn by his official deed. The execution under which the levy was made he had lost, or so mislaid as that it could not be come at. It would be dangerous in the extreme, to the best interests of the community, were this exceedingly loose and very incorrect procedure to be upheld and supported. Where there are so many materials, from whence to furnish out description, as appertain to lands sold under execution, the omission neither can, or ought to be supplied by oral testimony. The certainty required by law should be found in the deed itself, and not sought for aliunde. Had the description been "all that tract of land, lying in South Carolina," it would have been just as good as that furnished by

THE STATE, vs. M'KENNAN.

this deed. True, it might have increased the perplexity of the alienee, to find where it was situated, from the extended limit of the search to be made, but in point of legal certainty, it would have been precisely the same. I am of opinion that the motion for a non suit should prevail, and the postea is to be delivered to the defendant.

Nott, and Huger, Justices, concurred.

Desaussure, for motion.

Miller, contra.

THE STATE, vs. JAMES H. M'KENNAN.

The indictment charged the defendant with having committed perjury, by swearing at a court in July, that he had witnessed a transaction in October of the same year. Held not to be a repugnancy nor to afford cause for arresting the judgment.

One who had been charged with a crime by the oath of the defendant, was a competent witness against him, on his trial for perjury.

THE defendant was indicted for having committed perjury, on the trial of an action of slander, (George Reid, vs. James M'Wright.) The perjury assigned, was in swearing that Reid had been seen by the defendant in a certain position, which indicated that he was in the act of bestiality, &c. The testimony need not be recited; but George Reid swore to his own innocence, and that he never was seen in the situation described by the defendant. This witness was objected to by the counsel for the defendant, as being incompetent on the ground of interest; in as much as a conviction of the defendant would prevent him from being a witness in an indictment against George Reid, who was therefore interested to procure a conviction. The court over ruled the objection. The jury found the defendant guilty.

The defendant now moves the court in arrest of judgment, Because the indictment sets forth that at July court, 1823, in a certain trial then had, the defendant swore that at a time subsequent, to wit, on the tenth of October of the same year, he

THE STATE, vs. M'KENNAN.

had seen the plaintiff in a certain position; which makes the indictment contradictory, repugnant to itself and void; and for a new trial:

1st. Because the court admitted George Reed, the party aggrieved by the supposed perjury, as a competent witness.

2d. Because the evidence was not sufficient in law to authorize a conviction.

The opinion of the Court was delivered by Mr Justice Richardson.

The motion in arrest of judgment is founded upon a supposed inconsistency appearing on the face of the indictment, in stating that the defendant, in July 1823, swore that he saw the crime committed on the 10th of October in the same year; which is inconsistent and impossible, because the 10th October, 1823, had not occurred at the time of the oath taken. No rule in pleading is clearer or more rational than that the indictment should set forth the facts and circumstances necessary to constitute the supposed crime, without inconsistency or repugnancy. For instance, to state that the crime had been committed upon a day yet to come, would be repugnant and render the count void. But this cannot be said of the indictment before us; for it does not state that the defendant swearing in July, 1823, committed the supposed perjury upon the 10th October, but that the defendant committed the perjury in July, by swearing that Reed had done a certain act on the 10th October. For the purpose of considering the question of arrest, we must take the facts as set forth, and if the defendant did swear that Reed committed the act in October, 1823, however inconsistent the evidence may have been, yet the indictment cannot be incorrect in setting it forth precisely as delivered in court from the mouth of the defendant. On the contrary, as a general rule, the greater the departure from such a course, the greater the danger of incorrectness: for though a general account of the words delivered, may not be bad, yet an exact detail, even when superfluous, must be better. In a word, to describe the act charged just as it happened, cannot be wrong; and if the act consists of supposed false words spoken on oath, the same rule applies and

THE STATE, vs. M'KENNAN.

with the same force; the end in view being a correct representation of the fact. The argument used cannot therefore prevail.

It has been further suggested, that perjury cannot be predicated of the oath, however false and material, if the defendant ascribed an impossible date to the act charged to have been committed by Reed. But I can perceive no substantial reason for this objection. A witness may through design, inadvertence, or even a careless habit, acquired in colloquial communication, ascribe an impossible date, and yet relate the material facts with great effect and without suspicion of falsehood. In speaking of recent occurrences, how often do we hear "the year eighteen," or "the year twenty," used for 1818 or 1820; or I was born in 70, for 1770, &c. arising from habit; and not unfrequently such mistakes as the following, "1814" in place of "1804," "1828" for "1818," arising from inadvertence. Yet it does not follow that the important facts, thus connected with a date literally impossible, become thereby unmeaning and frivolous. Neither the design nor impression of the speaker can be so easily concealed, of which we cannot have a more perfect example than in the case before us; for notwithstanding the inconsistency as to time, still every one must feel that if the allegations of the indictment be true, the defendant's oath was impressive and left a deadly wound upon his neighbour's reputation.

The next objection is, that Reed was an incompetent witness, because by possibility, he might be indicted for the crime charged by the defendant, and thereby had become interested to render the defendant an incompetent witness, which he might do by convicting him of perjury—And certainly he may feel a bias arising out of his possible consciousness, or the anticipation of such eventual consequences; but his danger is barely possible, at least until an indictment shall have been found against him. On the other hand, if every defendant could get rid of the evidence of his prosecutor, by charging him in turn with a felony, I know not how any real felon could be brought to justice, provided he can find out in due time the names of the witnesses against him; for he would have only to charge each

PEARCE, vs. ZIMMERMAN.

with a crime, and then say that they were all interested to convict him, in order to render him an incompetent witness against themselves. This objection must therefore go to the credit and not to the competency of Reed. Upon the third ground of the want of full testimony, the court is of opinion that a new trial should be granted without prejudice.

Johnson, and Huger, Justices, concurred.

I concur on the last ground, Gantt.

Hill & Martin, for the motion.

Clark, Solicitor, contra.

COPLAND PEARCE, vs. EX'RS. OF WM. ZIMMERMAN.

The acknowledgement of an executor, will revive a demand, barred by the statute of limitations, at the time of the acknowledgement, which was not barred at the death of the testator.

This was an action of assumpsit upon an open account, to which the defendant had pleaded the statute of limitations. The account was raised in 1813; the testator died in 1815, and in 1822, one of the executors acknowledged the account to be still due to the plaintiff. No question was made upon the pleadings, so that the single question for the consideration of the court was, does the acknowledgement by an executor of an account clearly due at the death of his testator, but which is barred by the statute of limitations, at the time of the acknowledgement, take the account out of the statute. The plaintiff recovered his account, under the charge of the presiding judge, and the motion was for a new trial; because the admission of the executor, made after the account had been already barred by the statute, could not revive the plaintiff's demand.

The opinion of the court was delivered by Mr. Justice Richardson.

It has been decided, that a promise by one joint debtor, to pay a debt barred by the statute, is sufficient to take the case out of the statute: 15 *Johns. Rep* 3. so a promise by one partner, made after the dissolution of the partnership, is also sufficient, 6 *Johns.* 267; and in the case of *Briggs, vs. Ex'rs. Stark*, 2 *Conn.*

MERRITT, vs. WILLIAMS.

Rep. 111; this court decided that a promise by one of several executors took the case out of the statute. Still it is urged that the case before us presents a new fact, in as much as it appeared that the account was barred by the statute, at the time of the acknowledgement made by the executor. But in the case of *Johnson, vs. Becuostee and others*, (15 John.) before noticed, the debt was actually barred at the time of the promise by one of the joint debtors: And I can perceive no good reason for the distinction between a promise before, and one made after the debt has been barred; provided the debt was a subsisting one and not barred at the death of the testator. If it was due at that time, the executor is the proper judge whether it has been since paid. The lapse of time raises no more than a presumption of payment by virtue of the statute, which presumption is as well rebutted by the promise made after the lapse of the four years, as if it had been made before. In both instances, the object is to discover whether the presumption still remains, i. e. whether the payment has been made or not. And the acknowledgement discovers the truth equally in both instances. The mistake evidently arises from considering the statute an absolute bar to the recovery of the debt; whereas by the settled construction, it merely raises a presumption of payment, arising from the lapse of time, which may be rebutted in various ways.

The motion was therefore refused.

Johnson, Nott and Colcock, concurred.

Gantt, dissented.

Miller, for the motion.

Levy, contra.



MARGARET MERRITT, by her next friend, vs. MATTHIAS WILLIAMS.

Submission to arbitration, by a father, on behalf of an infant child, with an award thereon, will bind the infant.

ACTION of assault and battery. The defendant pleaded a submission by the father and next friend of plaintiff, who was an infant, and an award thereon. Plaintiff demurred generally. The court overruled the demurrer.

MERRITT, vs. WILLIAMS.

The plaintiff moved to reverse the decision, on the ground that a father, as next friend, cannot bind his infant child, by submitting to arbitration her claims for injuries to her person.

The opinion of the Court was delivered by Mr. Justice Nott.

It is somewhat remarkable that so little should be found in the books on this subject. One would have supposed that Judge Rives, in his treatise on domestic relations, would have thrown some light upon it; but he appears to have passed it by unnoticed. In the case of *Weed, vs Ellis*, 3d. *Caine's Reports*, 253, it was held that "the guardian of an infant might submit to arbitration on behalf of his ward," and that a performance will be a bar to a suit by the infant when he comes of age. Judge Livingston, who delivered the opinion of the court, says, "It is difficult to conceive how it should ever have been doubted whether guardians had this power, or whether an award under these circumstances did not put an end to all controversies submitted between the infant and the other party." The same learned judge further observes, "that an infant should not bind himself in this way, is right; but for that very reason the power should be lodged else where; and where it can be so properly entrusted, as with the person who has the care of all his property." There is so much good sense in this reasoning, that it cannot require authority to induce us to adopt it. And how much more strongly does it apply to a parent, who is the natural guardian of his infant child. It is necessary for the safety of infants themselves that it should be so. Their situation would be deplorable, if they were neither permitted to compromise and settle any disputes or difficulties in which they might be involved themselves, nor any other person could do it for them. Public policy, as well as the peace of families requires that parents should exercise such controul over their children. It would be inconsistent with the relation of parent and child, were every school boy permitted, without controul, to run to law with his childish quarrels, at the instigation of any officious friend. And in whose hands can such authority be so safely placed as those of a father? Who else can be expected to

EX PARTE.—RICHARDSON.

take the same interest in his welfare? The laws of nature, as well as the laws of society, seem to have united in placing the power in his hands, and I am not disposed to deprive him of it. The motion therefore must be refused.

Gantt, Johnson, and Huger, Justices, concurred.

Williams, for motion.

A. W. Thompson, contra.

EX PARTE.—JAMES B. RICHARDSON.

A Slave was tried for a misdemeanor by a justice of peace and two freeholders, sentenced and imprisoned. The freeholders in this case had not been summoned by warrant under the hand and seal of the justice; and one of them did not reside in the county where the offence was charged to be committed, nor had any freehold there. Held that the court was improperly organized, and prohibition granted.

THIS was a suggestion for prohibition. The suggestion sets forth that on the 17th September, A. D. 1823, information on oath was given by Edward Broughton, before Thomas Anderson, esq. justice of the peace of Clarendon county, in Sumter district, charging that Sam Mitchell, a negro man slave of Colonel James B. Richardson, had shot at him, the said Edward Broughton, in the said county, with intent to kill him.

That on said charge, the said negro Sam Mitchell was arrested, on the 19th of the same month of September. That on the 24th day of same month, the said justice Anderson organized a court at his house, consisting of two justices and five freeholders, to try the said negro Sam capitally. That he was accordingly tried capitally by said court, one of the justices and four of the freeholders of which had not been summoned by warrant under the hand and seal of said justices: that on the issue of not guilty, the witnesses were fully examined and counsel heard on each side; the same pretended court retired, and returned that they had no jurisdiction of the case; the offence not being capital. That afterwards, on the 27th of the same month, at the same place, the said Justice, with Richard Har-

EX PARTE.—JAMES B. RICHARDSON.

vin and John N. Carpenter, acting as freeholders, proceeded to try, and actually did try the said negro Sam Mitchell, on the same charges, although neither the said Richard Harvin and John N. Carpenter had been summoned for that purpose by warrant under the hand and seal of said justice Anderson or any other justice; although the said John N. Carpenter did not reside within the said county of Clarendon and held no freehold in said county, in his own right, and although the said justice Anderson and Richard Harvin had made up and expressed an opinion on the case, before the trial was gone into, by stating to the counsel in defence of the prisoner, that his efforts would avail nothing, as on the former trial of the prisoner for the same offence, they had heard the said counsel and he had not made an alteration of the opinion they had formed.

That these several objections were raised, made and urged on the said trial, against the court's proceeding to the said trial, and were severally overruled. That the said pretended court proceeded to the said trial, convicted the said negro Sam on said charges, and sentenced him to twelve months imprisonment; and on said sentence, the said negro Sam is now in confinement in the goal of Sumter district.

The suggestion prays for a writ of prohibition, to prohibit the said justice Anderson, John N. Carpenter and Richard Harvin from proceeding any further in the enforcing the sentence thus pronounced, and that they be compelled to release and revoke the said sentence and totally absolve the said negro man Sam Mitchell from the said sentence.

The answer of justice Anderson to the suggestion refers to a copy of the proceedings of the court for the particulars of the trial. He states that for the first trial he did summon a justice and freeholders, but they not attending, he was compelled to call on persons present and in his view, to serve on said court; and after this court, thus organized, decided they had no jurisdiction, he called in two freeholders of the same court, to proceed to the said trial; when the counsel for the prisoner objected to the court's proceeding to the trial, and stated he was not ready as some of the witnesses were gone home,

EX PARTE.—JAMES B. RICHARDSON.

and the court upon this statement agreed to postpone the trial to the 27th of September: that said negro Sam was taken into custody on the 19th September, and the court organized on the 24th, and as to any other matter or thing stated in the suggestion he demurs.

He further says that after the conclusion of the evidence on the part of the prosecutor, and no evidence offered in defence, he requested the counsel of the prisoner not unnecessarily to take up the time of the court, as he was satisfied with the evidence. There was a joinder in demurrer. John Carpenter's answer to the suggestion refers to a copy of the proceedings made out by the justice, and he further says he does not reside in the county of Clarendon, but he conceives he is a freeholder in said county, inasmuch as his wife has a fee simple estate of lands in the county. By the original entries of justice Anderson, it appeared that the arrest was made on the 19th September, and the court was organized and the first trial had on the 24th September, and a new organization of an entire new court, on a charge of misdemeanor, on the 27th September, when the conviction took place and sentence was pronounced. The presiding judge refused the prohibition. An appeal was now made.

1st. Because the decision was against law and evidence.

2d. That the ground for prohibition set forth in the suggestion were sustained by evidence contained in the answer of justice Anderson and John Carpenter, which went to shew that the court was not legally constituted and that they did not proceed in a lawful manner.

The opinion of the Court was delivered by Mr. Justice Colcock.

The 9th section of the act of assembly of 1740, directs that the "magistrate shall commit any slave charged with the commission of any crime, and shall without delay, by warrant under his hand and seal, call to his assistance and request any one of the nearest justices of the peace to associate with him, and shall by the same warrant, summon such a number of the neighboring freeholders to assemble and meet together with

EX PARTE.—JAMES B. RICHARDSON.

such justices," &c. This clause relates to offences of the higher grades. The next section relates to misdemeanors, and says that a slave so charged shall be proceeded against and tried for such offence in the manner herein before directed; but by *one* magistrate and *two* freeholders of the county. Now it appears from the proceedings of the magistrate himself that the person who set in the court had not been summoned according to the provisions of the act. The case was then coram non judice. There was no jurisdiction in this court. In fact it was not a court, it was an assembly of unauthorized individuals, and the case comes within the principle decided in the case of the *State, vs. Hudnal et. al.* 2 *Nott & M'Cord*, p. 419: and it further appears that John N. Carpenter was not of the county, and therefore not qualified to sit on the trial.

It was suggested however, that as the court had passed sentence and the sentence was in part executed, the prohibition could not issue, for there was nothing to prohibit. This would be a most unfortunate state of things, for in most cases these inferior tribunals proceed with such expedition that it is impossible to stay their progress before they give judgment and pronounce sentence. The proceeding by prohibition is intended to restrain these subordinate jurisdictions within their prescribed limits and to punish them when they exceed them; besides which, when their proceedings are declared to be illegal and void, they are not only amenable to the court but also to the party injured. 5 *Bacon*, p. 648, 661; *title prohibition*. The motion is therefore granted, and it is ordered that a prohibition do issue.

Colcock, Johnson, Huger, Richardson, and Gantt, Justices, concurred.

Levy, and M'Willie, for motion,
Mayrant, contra.

WM. CLARKSON, vs. J. W. CANTEY.

The interest which has accrued on a senior execution, subsequently to the date of a junior execution, must be paid, before any part of the money collected can be applied to the satisfaction of the junior execution.

THIS was a rule against the Sheriff, to shew cause why he did not pay over the money which was in his hands, and which he had collected from John Ballard, in satisfaction of an execution which Wm. Clarkson had obtained against the said John Ballard. The sheriff shewed for cause, that there were older executions in his hands against the said Ballard, which would take the whole of the money. It appeared that a large portion of the amount due by Ballard on the senior executions, was the interest which had accrued since the date of Clarkson's execution; and the only question in this case was, whether the senior judgment creditors were entitled to recover the interest which had accrued on their judgments subsequently to the date of Clarkson's. The circuit court decided that the senior executions, principal and interest, were to be paid in preference to Clarkson's. From this decision Clarkson now appealed.

The opinion of the Court was delivered by Mr. Justice Huger.

The legislature in allowing interest on all judgments, intended to furnish an inducement to judgment creditors to indulge their debtors. This inducement would be much diminished, if the interest as well as principal were not secured by the judgment. The subsequent judgment creditor is not placed in a worse situation by allowing interest, (which is only an equivalent for the use of the principal) than he would be if the senior execution were enforced as soon as lodged; a result which would generally follow, if the interest as well as principal were not secured by the judgment. In similar cases interest has never been separated from principal. The motion is refused.

Nott, Johnson, Richardson, and Gantt, Justices, concurred.

THE STATE, vs. ANDERSON VAUGHN.

A warrant issued under the hand of a justice of peace, on which the defendant was taken, was held an effectual commencement of a prosecution, though the warrant was not sealed.

IN this case, the defendant was indicted for hog stealing. It appeared that the bill was found against him two years after the offence was committed. He therefore contended that the prosecution was barred by the lapse of time. The solicitor produced the warrant on which he had been taken, and which had been issued in less than six months after the commission of the offence. But the warrant was not sealed. The defendant's counsel contended that a warrant ought to be sealed; and that this therefore could not be regarded as the commencement of the prosecution. This objection was overruled in the circuit court, and a motion was now made to reverse that decision.

The opinion of the court was delivered by Mr. Justice Huger.

Formerly, seals appear to have been regarded with more respect than they are at present. When the art of writing was confined to a few, seals were used to designate persons; but now that writing has become common, the person is identified by the hand writing, and seals are seldom used but to give character to the instrument. There appears to be no reason why the official act of a magistrate should be under seal, as it derives its character from the law which prescribes it. Should a statute prescribe a seal, it must be followed; but where no such requisite is prescribed, it is unnecessary: (1 *Hitty, Crim. Law* 38.) The motion therefore must be dismissed.

Nott, Johnson, Gantt, Richardson, Justice concurred.

WM. MEANS and others, vs. ANDREW B. MOORE and CHARLES MOORE, Executors.

Testator intending to alter his Will and make a new one, gave directions for that purpose to witness, as he read over the Will to him. The witness made memoranda, by interlining the proposed alterations in pencil, "for his own convenience." A single word was scored through with the pencil. Testator not having completed his directions the first day, was unable from weakness to complete them on a second, and the new Will was never drawn: Held no revocation, the "obliteration" not being made by the direction of testator, nor intended to revoke the whole Will.

THIS was an appeal from the Ordinary of Spartanburg district, who admitted to probate a paper dated the 29th October, 1817, which was executed in due form, to pass real and personal estate, and purported to be the last will and testament of General Thomas Moore, deceased. It was contended before the Ordinary, that the will had been revoked by the acts of the testator in his life time, and the same question was brought before the court below, on an issue by suggestion.

The will on its production to the court appeared perfect in all its parts, and free from all marks of burning, tearing, cancelling or obliterating, except that in one clause, the word "man" was scored through with a pencil and the word "woman" inserted in pencil above it. It was stated however that several interlineations had been made in pencil which did not there appear, with a view to alter the will. This evidence was objected to, but the objection was overruled.

A witness, Major Andrew Berry, was then called, who proved that he went to the house of the testator, during his last illness and a few days before his death; that he learned, in conversation with the testator about the state of his affairs, that he had made a will, and that it was at Dr. Moore's. The witness then asked him, if he had provided in it for his youngest daughter, (who it appeared had been born after the execution of the will.) The testator was uncertain; the witness then asked him if he should procure the will to ascertain that fact, to which the testator assented. The will was accordingly procured, and the testator began to read it, but soon desisted from

MEANS and others, vs. A. B. MOORE.

weakness, and requested the witness to read it over aloud, which witness did, and when he had finished, the testator said, "it is true she is not provided for." The witness then said to him, "you must make another will," and urged upon him the necessity of it; to provide for his youngest daughter, and asked if he could be of any use in preparing a new will or in making the necessary alterations. The testator replied in the affirmative, and directed the witness to get a pencil, and he would give him directions for making the memoranda necessary to draw the new will. The witness procured the pencil and made certain interlineations in some of the clauses of the will; the sole and express object of which was to enable the witness to draw another will. In making them, the witness did not use the words of the testator, but the substance only; and they were all made thus—That certain property in such clauses as were interlined, "is to be stricken out" and other property "is to be put in." After going through several clauses in this way, the testator said he was too weak to go on, and told the witness to stop: he then desisted and proposed to call on the testator the next day to finish the business; to which the testator assented. The witness attended accordingly, but found the testator unable to resume the subject, and nothing more was done.

The testator did not direct the witness to erase any word or to make any obliterations, nor did he know that any erasure or obliteration was made. The witness did not read to him what he had interlined, nor did the testator see the will after the interlineations were made. The testator did not say that he revoked the will or intended to revoke it; nor did he direct it to be cancelled or destroyed; many of the clauses were untouched, and no attempt was made or intention expressed, to alter the disposition of the real estate. The testator's motive was to provide for the youngest daughter, and the alterations proposed, were calculated and intended to accumulate a legacy for her. Some three or four years before his death, the testator in conversation with another witness, said he had made a will but was not satisfied with it and wished to alter it. He said his youngest daughter was unprovided for in it, but he did not care

MEANS and others, vs. A. B. MOORE.

for that, as the law provided for her; that his property had increased and that Mrs. Berry, one of his daughters, had certain negroes in her possession, not bequeathed to her in the will, which he wished to give her.

The jury, under the charge of the presiding judge, found that the will was revoked.

A motion is now made to set aside the verdict and for a new trial, on the following grounds:

1st. That no act of revocation was apparent on the face of the will, and that the evidence of such act cannot be supplied by parol.

2dly. That the acts done by the direction of the testator are not embraced within the statute of frauds or act of assembly, and do not amount to a revocation.

3dly. That the intention to revoke, (if there was any) was not absolute but conditional; it depended upon the execution and substitution of another will which was never perfected, and therefore no revocation took place.

4thly. That the revocation was partial only and not total.

For the motion, it was argued: Our statute authorizes the revocation of wills, by destroying or obliterating. There must be an intention to revoke, with an act of obliteration. Was there any thing which amounted to an act of obliteration. An interlineation is not a defacing, nor does it necessarily interfere with the sense, as obliteration must. If immaterial words or unmeaning marks be made between the lines of a will, it will hardly amount to the substantial act of obliteration which the statute intends. Interlineation may add to and thus alter the sense; but the alteration is not made by obliterating. *Sutton, vs. Sutton, Cowp. 812; 4 East, 417; Jackson vs. Halloway, 7 Johns. 398.*

If the act was not intended to apply to the whole will, but only to make partial alterations, the cases already cited, shew that it will not operate a revocation of the whole. A testator may alter or strike out a particular clause, and it will have no effect on the rest of his will. *3 Bos. and Pul. 16; 6 Cruise's Dig. 66; Bac. ab., Tit. Devises; Pow. on Dev. 644.* If there

MEANS, and others, vs. A. B. MOORE.

was any present intention of altering the will, it was only with a view of making a provision for his youngest daughter.

But there was no present intention of altering the will; memoranda were made with a view to a future will, and the intention to alter in future was conditional and dependent on the execution of the new will. *Onions vs. Tyrer*, 1 *Pr. Wm.* 343. The execution of a new will does not revoke a former, unless by its express terms or by inconsistent provisions. This seems rather to have been intended for a codicil. We do not contend that it is necessary to erase the whole will, in order to revoke; a very slight act will be sufficient, if it be accompanied with the present intention of revoking the whole. Were further cited, *Brailsford, vs. Johnson*, 2 *N. & M.C.* 272; *Doe ex dem. S. Perkes, vs. E. Perkes et al.* 3 *Barn. & Ald.* 489.

Against the motion. The making of the pencil marks was certainly an act of the nature of that intended by the statute. The slightest act will be sufficient, and it is not necessary that the will should be rendered illegible. The tearing of seals or a corner of the paper, is a sufficient destroying, if the *animus revocandi* exists. The court will regard the will as if the pencil marks which have been rubbed out were still upon it; and if the intention with which they were made be equivocal, parol testimony will be admitted to explain. *Cowp.* 52; 1 *Rob. on Wills*, 321; *ib.* 325, *Brailsford, vs. Johnson*; *Witherspoon, vs. Witherspoon*, 2 *M.C.* 521.

The question of intention was a matter exclusively for the jury and they have found the intention to revoke. The finding of jury was not without evidence. The testator on more occasions than one expressed himself dissatisfied with his will and determined to alter it. He had strong reasons for this dissatisfaction, one of his children being unprovided for. The jury were expressly charged by the judge, "if you believe the testator preferred this will to dying intestate, you ought to find in its favor."

The opinion of the Court was delivered by Mr. Justice Huger.

MEANS and others, vs. A. B. MOORE.

Two questions arise in this case: 1st. were the pencil marks an obliteration within the meaning of the statute? and

2dly. Were they done with an intention of revoking the will?

To constitute an obliteration, it is necessary that the writing testamentary or some part of it should have been defaced by the testator himself, or by some other person in his presence, and by his direction and consent.—(*See p. laws. 491.*) In what manner and by what means the writing shall be obliterated, is not prescribed. It is enough if the writing be obliterated by any means and in any manner, provided the other requisitions of the act be complied with. It must be done (whatever means be employed) with the intention of obliterating.—An accidental or unintentional obliteration, done by the testator himself, or by another, will not satisfy the requisitions of the act.

If the pencil marks were made by the testator or by his directions, with the intention of obliterating the writing, the act so far would have been complied with; but the evidence in this case does not shew that the testator made the pencil marks himself, or that they were made by his direction; the words of the witness copied from his own statement are, "it was done for my own (the witness') convenience;" and that the pencil marks were not made by the directions of the testator, is corroborated by the further acknowledgement of the same witness, that he had himself rubbed out the marks. If the witness had understood the pencil marks as done by the testator, he could not have regarded himself as at liberty to rub them out.

But had the testator made the pencil marks himself, or had caused them to be made with the intention of an obliteration, the purpose for which he had obliterated must appear, before any just conclusion could be formed as to the effect of such an obliteration.

It is intention which gives character to an act. Had he pencilled the whole instrument, without the intention of revoking it, it would not have been revoked. Had he pencilled a part of it (symbollically) with the intention of revoking the whole, the whole would have been revoked. An intended

THE STATE, vs. DURANT.

obliteration must be coupled with an intention to destroy the whole instrument, to constitute a revocation. The intended obliteration of a part, without the intention of destroying the whole, is no revocation. (*See Pringle and Ex'rs. vs. McPherson, & Co.*)

In this case, there is no evidence of any intention to revoke the whole Instrument. The extent of the testator's wish, was to alter certain legacies and insert another; with the devise he was entirely satisfied. The obliteration therefore, though intended, was not coupled with the intention of destroying the whole instrument, and cannot operate as a revocation.

Had, however, the testator commenced his instructions to the witness, with the intention of making another will, by which the former was to be revoked, yet as these instructions were not completed, it must be regarded as an imperfect inchoate act, by which his former will (a perfect act,) could not be revoked. (*See the case of Brailsford and Johnson, 2 Nott & McCord, 272.*) The motion therefore in this case must prevail, and a new trial is ordered.

Johnson, Richardson and Gantt, Justices concurred.

Harrison and Earle, for motion.

Williams, and Wallis Thompson, contra.



THE STATE, vs. JOSEPH DURANT.

The act of the Legislature of 1822, requiring the Governor, whenever a vacancy shall happen in the office of Sheriff, to issue his writ to the managers of elections for the district, requiring them to hold an election to fill the vacancy, does not repeal that part of the act of 1808 which directs elections for Sheriffs to be held by the managers, in all districts in which vacancies exist, on the second Monday in January and the day following in every year; nor is the writ of the Governor necessary to the validity of these elections.

This was an information in the nature of a Quo Warranto, calling upon the defendant to show by what authority he exercised the office of sheriff of said district.

THE STATE, vs. DURANT.

The defendant answered, and set forth an election held by the managers of elections for Sumter district, on the second Monday in January, 1824, and the day following, at which he was lawfully elected into said office.

To that plea, it was replied, that the said pretended election was held without the writ of election of the Governor, issued to said managers, in that behalf, as is required by the act of the General Assembly of 1822.

To which the defendant demurred.

The act is in these words, "whenever any vacancy shall occur in the office of sheriff in any of the circuit court districts in this state, by death, resignation, removal from the state, or removal from or expiration of office of any sheriff, or where any election shall be declared void by the managers, or where any two or more persons shall have an equal number of votes, it shall be the duty of the governor forthwith to issue writs of election."

For the motion, it was argued that although the words of the act of 1822 seem very explicit, yet by comparing it with the act of 1808 on the same subject, it will be seen that the writ of the governor was not necessary to the validity of this election. That act provides that elections shall be held "on the second Monday and the day following, in January next," and on the same days in every year thereafter, to fill vacancies in the office of sheriff. Another clause of the same act gives the governor power to appoint sheriffs, in cases of vacancies occasioned by "death, resignation, removal out of the state, removal from, or expiration of office," to hold their appointments until the next election. The operation of the act would have been to render the times of the elections of sheriffs and the expiration of their offices uniform throughout the state. But with respect to sheriffs already in office, their appointments having been made at various times, and the tenure of their offices being for four years, it was apparent that their offices would expire at various periods of the year. To fill the vacancies occasioned by these irregular *expirations of office*, the governor was authorized to make appointments.

THE STATE, vs. DURANT.

When it was decided by this court that a sheriff, once lawfully appointed, must by the constitution hold his office for four years, the Legislature, for the purpose of securing the elections to the people, passed the act of 1822. By taking both acts together, it will be apparent that the legislature, by the latter act, only intended to require the governor to issue his writ of election in cases in which, under the former, he had the power of appointment—that is to say, in cases of the *irregular* expiration of office before referred to, and not where there was a regular expiration succeeding a regular election, as in the present instance.

Against the motion. When the words of a statute are clear, there is no room for construction. None can be more explicit than those of this act “in every case of vacancy arising from” various enumerated causes and from “expiration of office.” It does not appear that the requisition of writs of election, in cases of expiration of office, can be restricted to the *irregular* expirations contended for. The Governor’s power of appointment was not so restricted by the act of 1808. If the managers failed to hold an election, he might appoint—if from any cause he found the office vacant, he might fill it. It is true the occasion would seldom arise for him to exercise the power. The sheriffs elected on the second Monday in January, and the day following, were, by the act of 1808, to enter on the duties of their office on the second Monday in February following; so that at the succeeding election a successor would be provided, ready to fill the vacancy the instant it occurred.

The provision of the act of 1808, for holding elections to fill vacancies about to occur, is inconsistent with the letter of the act of 1822, which provides that when the vacancy *has happened*, the clerk of the court shall give notice to the governor, who shall thereupon issue his writ of election; and is, we contend, therefore repealed.

But if this is thought to be an adhering too closely to the letter, let us regard the spirit and purposes of the act. The act intended to provide that the sheriff’s offices should expire

THE STATE. vs. DURANT.

regularly at a fixed period of the year, and that elections should be held regularly, to supply the vacancies. The two objects seem to be connected and mutually dependant. When the court decided that sheriffs once in office must continue for four years, and when the act of 1822 was passed, many sheriffs were in office by the governor's appointment, made at various times of the year. The commission of these must continue to expire irregularly. It can scarcely happen in any district for many years, that some accidental vacancy will not occur, from death, resignation or other cause. Whenever one of these shall occur, at a different period from that contemplated by the act of 1808, it is plain that the office must continue to expire, and the new appointments to be made irregularly. Thus in the course of a few years all the sheriff's offices in the state must expire irregularly. It can hardly be thought the intention of the legislature to preserve the regular election, when the object for which it was instituted is entirely defeated.

The presiding judge overruled the demurrer, and held that writs of election from the Governor, were necessary to the validity of the election.

This was a motion to reverse that decision.

The opinion of the court was delivered by Mr. Justice Nott.

Previous to the adoption of our present constitution, sheriffs were elected by the legislature. The constitution requires that "they shall be elected as they hitherto have been, until otherwise directed by law," but that they shall hold their offices for four years. In the year 1808, the legislature transferred the election to the people. The act declares "that an election shall be held on the second Monday and the day following, in January next, and on the second Monday and the day following in January, in every year thereafter, in such of the circuit districts as there may then be vacancies, to be conducted in the same manner, by the same managers, and to be holden at the same places as now are or hereafter shall be appointed by law, for the conducting, managing and holding elections for members of the legislature, to elect sheriffs for the several circuit courts

THE STATE, *vs.* DURANT.

districts within this state, wherein any vacancy shall or may hereafter happen in the office of sheriff; occasioned either by death, removal out of the state, resignation from, or expiration of office or otherwise of any person possessing the same."

A subsequent section of the same act provides "that the governor shall have power, and he is hereby required to fill up all vacancies in the office of sheriff, that shall take place by the death, resignation, removal out of the state, removal from or expiration of office, of any person possessing the same, or by any election of sheriff being declared void by the managers, or when any two or more candidates shall have an equal number of votes, to hold under such appointment, until such time as an election shall take place, according to the provisions of this act."

Here are two seeming contradictory clauses in the same act—one giving the people the right of election in all cases, when a vacancy shall happen, and the other giving to the governor the power of appointment, in terms equally extensive. But they are easily reconciled, when we look to the policy of the law. The object was to give to the people the power of electing all the sheriffs throughout the state—and the second Monday of January and the day following in each and every year, are declared the days of election for that purpose. No writ of election is required; but the managers, ex-officio, are to proceed to an election on those days, in all the districts where a vacancy shall then exist, from whatever cause that vacancy may have been occasioned. But they are not authorised to elect at any other time. And to prevent the inconvenience which might result from occasional vacancies in the course of the year, the governor is authorised to make temporary appointments until the day of general election shall come round.

But in the case of the State against McClintock, it was held that the legislature could not authorise such temporary appointments to be made. And that whenever a sheriff is appointed, (no matter by what authority) he is in, under the constitution, for four years. The effect of that decision would have been to defeat the object of the law entirely, and to transfer the appoint-

THE STATE, *vs.* DURANT.

ment of the sheriffs in all cases from the people to the governor. The act of 1822, is intended to counteract that decision, and to preserve to the people the privilege allowed them by the act of 1808. It commences with taking from the governor the power of appointment, and in its stead, authorises him to issue writs of election to the managers, appointing a time when they shall hold the election. The clause of the act of 1808, authorising the governor to appoint, is transferred to the act of 1822, limiting the power of appointment to that of issuing writs of election. The words of the two clauses are as nearly the same as it was possible to make them, except as to the power to be exercised by the governor. It is true, the terms of the clause in the act of 1822 giving to the governors the power to issue writs of election, are very general and may be construed to embrace every case of vacancy; and in all probability, if there had been no other act on the subject, would have received that construction. But they admit of a different view, when we read the two acts together, which must be done in order to give effect to either. There are no words of repeal in the latter act, neither is any such inference to be drawn from any of its provisions. If the act had simply taken from the governor the power of appointment, the people, by occasional vacancies, would have been left a great portion of the time without a sheriff—Because the managers can only hold elections by law, on the second Monday in January and the day following. To remedy that evil, the governor is authorised to issue writs of election, authorising them to hold elections at other times, whenever occasion shall require. But the remedy need not be applied, where the evil does not exist. There appears to have been an impression, that the managers could elect on the 2d. Monday in January and the day following, according to the general provisions of the act, in those cases only, where the vacancy happened by the expiration of office. But that is a mistaken view of the subject. They are authorised to elect at that time in all cases, where a vacancy may then exist, at whatever time it may have occurred, or by whatever cause it may have been occasioned.

THE STATE, *vs.* DURANT.

The two acts then may be constructed harmoniously together, and the two clauses rendered auxiliary to each other; If the governor shall omit or neglect to issue writs of election whenever a vacancy shall happen, the managers may open a poll on the day required by law, and proceed to an election without writs—if they should fail to do so, on that day the governor may issue his own writs, directing the election to be held on any other day. And when we see that the clauses of the act of 1822, authorizing the governor to issue writs of election, is couched precisely in the same words as the clause in the act of 1808, giving the power of appointment, except so far as was necessary to accommodate the phrasology to the new power conferred on him, it is reasonable to conclude that it was the intention of the legislature to require him to issue writs of election, in those cases only where he had before the power to appoint. That construction seems best to comport with the letter and spirit of both acts—it gives an uniform operation to both, and is the best calculated to insure an election with the least possible delay and inconvenience.

I think, therefore, that the decision ought to be reversed on that ground.

Nott, Gantt, Richardson, and Johnson, Justices, concurred.

Miller, Desaussure, and M^r Cord, for motion.
Harper and Mayrant, contra.

CONSTITUTIONAL COURT.

CHARLESTON,
MAY TERM, 1824. }

JUSTICES PRESENT.

C. J. COLCOCK, A. NOTT,
R. GANTT, J. S. RICHARDSON,
D. E. HUGER.

ALEXANDER CORRIE, vs JACOBS et alios.

The clerk of the court may issue execution for his costs, against the party liable to pay them, whenever the suit is settled or determined, though no judgment be entered up in the cause.

But unless he have previously delivered to the party an account of the particulars and amount of fees charged, the execution is irregular and will be set aside on motion.

No costs are allowed on such executions, except two and a half per centum, commissions on the amount collected, to the sheriff.

ALEXANDER CORRIE, the late clerk of the court for Beaufort district, being about to retire from office and having a large amount of outstanding costs due to him, employed an attorney in the collection of them. He issued executions and placed them in the hands of the sheriff for collection. The attorney charged \$1 28 for each execution; the sheriff also charged his usual fees. There were two classes of cases: the first, those which had been settled at the plaintiff's costs, without having been carried into judgments: the second, where the plaintiffs had prosecuted their suits to judgment, and the costs had been taxed in the execution against the defendants.

CORRIE, vs. JACOBS.

A motion was made at Coosawhatchie, spring term 1824, to set aside all these executions on the following grounds:

1st. That no executions could be issued against plaintiffs, without regular judgments having been entered up against them.

2nd. That no executions ought to have been issued, until a bill of the costs had been made out and presented to the party liable to pay them, and payment demanded of him.

3d. That all the demands which were of four years standing were barred by the statute of limitations, and therefore no execution could be issued upon them.

4th. That the attorney's and sheriff's costs were illegally taxed, as they were not entitled to any fees on such executions.

The presiding judge granted the motion, and this was a motion to reverse that decision.

For the motion, it was argued that so much of the act of 1791 as requires the officers of court, previously to issuing executions for their costs, to furnish the party of whom they are demanded with a bill or statement, can only apply to cases which have been determined without proceeding to final judgment. After judgment, the costs are taxed and included in the judgment; which of itself is notice to the party. The object of furnishing the statement is that the party may have an opportunity of contesting the taxation and correcting any mistake. It must be sufficient however, for the clerk to put the statement into the hands of the sheriff; who is bound to serve it before he proceeds to levy. If he neglect to do so, he is answerable for any injury the party may sustain, but it does not render the execution irregular.

The plaintiff is liable for the costs incurred in prosecuting his suit, and if demanded, he is bound to pay them at every step. The judgment against the defendant is for costs which the plaintiff is supposed to have expended; but the plaintiff is not thereby discharged from his liability. They are the Plaintiff's costs and he may receive them, release them, or give indulgence. The officers in such case are entitled to costs of either party. 7 Cranch, 276; Bac. Ab. Tit. Costs, (Am. Ed.)

CORRIE, vs. JACOBS.

An execution for costs is upon the same footing with any other execution, and the costs of executing it must be allowed.

The act fixes no limitation of time to the right of issuing executions for costs. It is attempted to be fixed by analogy to the provision of the statute of limitations, which respects simple contracts; but the analogy is rather to debts of record; the taxation of costs being in the nature of a judgment.

Against the motion, it was contended that a judgment should in every case be entered up before execution issued for costs. The act does not authorise executions for costs until the suit is determined, and in whatever way determined, judgment may be entered. The officers perhaps have a right to demand their costs for every service rendered by them at every step of the cause; but if they waive that right, the contract is to wait until the determination of the cause, and to have recourse to the party who shall be made liable by the judgment of the court.

When the judgment is against the defendant, the officers can have no recourse against the plaintiff, until nulla bona returned.

Costs are not allowed in any case unless given by statute. This act gives the sheriff 2 1-2 per centum, commissions, and excludes the inference of any others costs being allowed.

If the common law limitation of twenty years is to prevail, there must be a judgment, and the execution cannot be issued without it. If there is no judgment, it is in the nature of a simple contract demand.

The opinion of the court was delivered by Mr. Justice Nott.

This method of proceeding to collect the fees of the officers of court is attempted to be supported by the provisions of the act of 1791, 1 *Brevard*, 848, which is in the following words, "That at whatever stage any suit may cease or determine, the attorneys, clerks and sheriffs, shall have their fees, taxed, and on non-payment thereof executions may be issued against the party from whom they are due and be lodged with the sheriffs of the respective districts, and returnable at the per-

CORRIE, vs. JACOBS.

ensuing return-day, and the sheriff for his trouble in collecting such fees shall be allowed a commission of two and one-half per centum, to be paid by such defaulter. And no person shall be compelled to pay any of the aforesaid fees, unless at the time of the demand or before distress of goods is made, an account thereof shall be delivered, signed by the officer to whom the same is due, specifying distinctly every article in words at length, with the particular fee charged for it, and shall give a receipt for the same if required."

"That the several clerks and registers of the courts of justice and sheriffs throughout the state, shall collect in and receive their own fees from the different suitors or persons who are liable to pay the same in the said courts of justice respectively, except where the plaintiffs or complainants in any suit shall reside in foreign countries or without the limits of this state, in which case the agents or attorneys of the said plaintiffs or complainants shall be answerable for the payment of said fees, except the clerks of county courts, whose fees shall be collected as heretofore."

1st. I think that the object of the act was to give to the officers of court a cheap and summary remedy for the collection of their costs. It authorises them to have them taxed and to issue executions, at whatever stage the suit may be settled or determined, against the party liable to pay the same. It could not be intended that a judgment should be first entered up, because the execution is not required to be issued in the name of the party to the suit, nor for his benefit, but for the fees of the several officers who have been employed; and the costs of a judgment would frequently be more than all the other cost due; indeed in some instances, three times the amount.

It has been contended that an act authorising an execution to issue in this way would be unconstitutional. But I cannot perceive any ground on which such a position can be supported. A judgment is only one link in the chain of proceedings, and surely the legislature may dispense with it if they think proper. In our proceedings by way of summary process, neither declaration nor judgment are required. I think no doubt can

CORRIE, vs. JACOBS.

be reasonably entertained, of the constitutionality of the measure. The act does not indeed mention in whose name the execution shall be issued: But whether the clerk issue it in his own name or in the name of the party to the suit, cannot in my view affect the question. I am of opinion therefore that the clerk is authorised by the act to issue an execution, at whatever stage of the proceedings the cause may have terminated, for the fees then due, without any judgment having been entered up. Without such construction, the act would be a dead letter. For previous to the passing that act, if the plaintiff became nonsuited or discontinued or let fall his action in any manner, he became liable for costs, and judgment might have been entered up against him for them.

2nd. But I am also further of opinion that the clerk was not authorised to issue an execution, until he had presented the party by whom they were due with a bill, specifying the items, and demanded the payment of it. It was not the intention of the act to make the clerk the sole judge of the amount of fees due, but to afford the party an opportunity of discharging the debt without execution. I am of opinion therefore, that on this ground, the decision of the court below ought to be supported.

3rd. It is not necessary to the decision of these cases, that any opinion should be given on the other ground. I feel no reluctance however, at expressing my own. The right to issue an execution in such case is derived alone from the act of the legislature. The act does not change the nature of the demand; it only furnishes a new method of enforcing the payment of it. If therefore the claim be barred, the remedy is lost. I am of opinion therefore, that an execution could not be issued after the lapse of four years from the termination of the suit.

4th. The question respecting costs on these executions, is not more difficult. The right to issue an execution in this summary way, is a privilege allowed to the officers of court, and if they will have the benefit of it, it must be without costs. One object of the provision was to save expense: The clerk therefore is not entitled to a fee for issuing the execution. He is under no necessity to employ an attorney. The act allows the

CORRIE, vs. JACOBS.

sheriff 2 1-2 per centum for his trouble in collecting such fees; and those are the only costs allowed.

Some question has arisen with regard to the form of the execution, and in whose name it shall be issued. The act is silent upon the subject, but I presume it may be in the name of the person to whom the costs are due, as the 29th sec. of the act provides "that the several clerks and registers of the courts of justice and the sheriffs throughout the state, shall collect in and receive their own fees from the different suitors or persons liable to pay the same, &c." From this provision it would appear that the fees are given to the respective officers of the courts and not to the party; and that they are authorized to collect them in their own names. I therefore concur in opinion with the presiding judge, and think that upon the three last grounds the executions were irregular and ought to be set aside.

The second class of cases is, where the plaintiff has recovered judgment against the defendant. In those cases, I am of opinion that the officers of court can in no event have an execution against the plaintiff. The words of the law are, "at whatever stage any suit may close or determine, the attorneys, clerks and sheriffs shall have their fees taxed, and on non-payment thereof, execution may be issued against the party from whom they are due, &c." That must mean the party who becomes legally liable by the determination of the suit. The costs in such cases are taxed in the judgment with the debt or damages and collected with them. The plaintiff is nevertheless liable for the costs which he has created, but he is liable on his contract only and is not subject to an execution. It is a sufficient privilege granted to the officers of court, that they are already allowed the double remedy of an execution against one party and an action against the other, without allowing them an execution against both. I am, therefore, of opinion that the decision of the court below was correct in these cases also, and that the motion in both instances ought to be refused.

Bay and Richardson, Justices concurred.

Gantt, dissented.

Cross and Gray, for motion.——Clark, contra.

JOHN PORTEOUS, vs. JOSEPH HAZEL and JOSEPH JENKINS.

Defendants with others, assuming to act as a patrol, went into the house of plaintiff and took from thence two guns. Plaintiff was not then in his house; but a coloured person, who had charge of the plantation. No captain of patrol was present, but the son of the captain of patrol, who claimed to command as being authorised by his father. Held that they were no lawful patrol and their act a trespass.

The jury were bound to find damages, at least to the value of the property taken.

The action was trespass for taking two guns from the plantation of the plaintiff, on Lady's Island. The defendants and others assuming to act as a patrol, went into the house of the plaintiff and took from thence two guns, proved to be of the value of twenty-five dollars. The plaintiff was not then living in his house, but it was in the possession of a coloured man, who took charge of, and acted as overseer of the plantation. He was asleep when they came to the house and opened the doors. No regularly appointed captain of patrol was present; but the son of the captain of patrol, who claimed to command by the authority of his father, as his deputy.

Verdict, one Cent.

A motion is now made for a new trial on the grounds:

1st. That the verdict was against law, in as much as the plaintiff proved the deprivation of property to the amount of twenty-five dollars.

2nd. Because the verdict was against evidence.

The opinion of the Court was delivered by Mr. Justice Colcock.

If the case had been one in which the discretion of the jury was unlimited, the court would not interfere; but it is imperiously called on to preserve the law, whenever its wise and wholesome provisions are violated by the verdict of a jury. The defendants and those associated with them cannot be considered as a patrol. The powers given to the patrol are great; and many of them in opposition to the common law rights of the citizens. The legislature were, therefore, guarded in the delegation of this extraordinary power. They direct that the captain of the beat company shall appoint a fit and discreet

PORTKOUS, vs. HAZEL & JENKINS.

son to act as captain of the patrol, and require that he shall prick off the names of such persons as are intended to be placed under his authority, requiring them to perform this duty twice in every month. The law further gives to the captain of the beat company authority to fine the captain of patrol for a neglect of duty; and to the captain of the patrol, the power of fining those who are placed under his command for any disorderly conduct. A strict conformity to these provisions is indispensably necessary to constitute a legal patrol, and here we find the son of the captain of the patrol acting for him. Was he answerable to the captain of the beat company? Surely not. Could he control the acts of those who were with him by fine or imprisonment? Surely not. Again, one of the defendants was not on the list of those who had been placed under the authority of Mr. Tripp the elder. But supposing they had been a regularly constituted patrol? There is no authority given by the patrol law or any other law of the state, to enter the dwelling house of one, a free man of the country, in which there was no riot nor disorder, and take from thence his arms or any other property. The act then was illegal and the evidence was clear that the property taken was worth twenty-five dollars. The jury then were bound to have found for the plaintiff at least the value of the property taken. The law entitled him to recover so much at least. He was as much entitled to a verdict for that amount as if he had brought assumpsit and proved a sale of the property. Whether they should have found greater damages was for them to determine, therefore no opinion will be expressed as to that. The motion is granted.

Bay and Richardson, Justices concurred.

AARON P. SMITH, vs. JOHN LYONS.

A Note of Hand not negotiable cannot, under the act of the legislature of 1798, be transferred verbally or by delivery merely.

THIS was an action by the plaintiff, as the assignee of a note not negotiable. On the trial it appeared that the note had not been assigned in writing, it had passed by a mere verbal assignment or transfer. The defendant's counsel moved for a non-suit, on the ground that such an assignee could not maintain an action in his own name, which was ordered.

A motion was now made to set aside the non-suit, as the action was well brought, a verbal assignment being sufficient to maintain the action.

Barnwell, for motion. Writing is only evidence of a parol assignment or transfer. At common law, no chose in action could be assigned. By our statute this sort of chose in action is made assignable; and the question is in what way. Before the statute, choses in action were assignable in equity; and this might be by parol and was not within the statute of frauds. 1. *Ves.* 333; *id.* 411; 4. *Taunt.* 326. The assignee was forced however to sue at law in the name of the obligee or payee of the contract, which was inconvenient. The statute only removes a disability and authorizes him to sue in his own name. Possession of personal property is evidence of right and the mode of transfer is not to be enquired into. It has been held that the parol assignee of a covenant of warranty might sue (*Cro. Eliz.* 436,) and this court has decided that a bond may be assigned by parol. (1 *N. & M.C.* 249.) The common law acknowledges but two sorts of contracts—by specialty or by parol. There is nothing in this statute to give it the effect of the statute of Anne. That was the statutory recognition of an existing custom and was construed with reference to the custom. Writing is not necessary to the transfer of negotiable paper further than the custom exacts. A note payable to bearer or one endorsed in blank may be transferred by delivery merely: a bill of exchange may be verbally accepted. No inconvenience can arise from giving the construction con-

SMITH, vs. LYONS.

tended for: the note is not rendered negotiable, and the maker will be allowed all equities and setts-off against the holder.

Clarke, contra. The case cited from 1, N. & M. C. 249, was one of assignment of a bond by writing. The case from *Cro. Eliz.* was one of a covenant running with the land, and the assignment was by operation of law. The assignment must be of as high a nature as the instrument to be transferred. 1, *Mass. Rep.* 117; 11, *Mass.* 491; 12, *Mass.* 212. Equity allows the assignment of choses in action by parol; but equity requires a consideration to be proved. *Freem.* 595. The maker of such a note can never be safe in making payment to such a holder; for payment to the fraudulent holder of a contract not negotiable will not protect. The non-suit was correctly ordered. The plaintiff by his declaration alleges himself to be assignee; but he proved neither assignment nor consideration.

The opinion of the Court was delivered by Mr. Justice Colcock.

The argument of the counsel has gone shew that a chattel may pass by a verbal assignment and delivery. I do not doubt but that an equitable interest may pass by such a transfer, but the question is, whether such an assignee of a note, not negotiable, can maintain action in his own name. No assignee of a bond or non-negotiable paper could at the common law maintain an action in his own name. But these transfers being frequently made and it being sometimes attended with inconvenience to sue in the name of the obligee or payee, the legislature thought proper to pass the act of 1798, authorising assignees of bonds or other non-negotiable paper to sue in their own names; and the question is who are meant by the word *assignees* in the act. The act, it is to be remarked, speaks of bonds first. Now who ever heard of a bond being assigned by a verbal transfer of the right? The general rule of law is that the assignment must be of equal validity with the things assigned; so that generally the assignment of a bond was not only in writing, but under seal; and of any other contract, less than specialty, by some writing. And this indeed is indispensably necessary from the nature of the thing.

LYNAH, vs. COMMISSIONERS OF ROADS.

For how is the obligor of a bond or the maker of a non-negotiable paper to know that he is safe in paying his bond or note to any one who may present it without a written assignment or order to pay it? When a paper is thus transferred, it is certainly an exception to the usual mode of doing business, and such an exception as the law ought not to provide for; for the law should never encourage men to conduct their business in a loose manner. It is a very easy matter to write an assignment. If any additional reasons were wanting, why such an action should not be maintained, I think it would tend to encourage perjuries. The motion is dismissed.

Bay, Nott, Gantt and Richardson, Justices, concurred.

Barnwell, for motion.

Clarke, contra.

EDWARD LYNNAH, vs. THE COMMISSIONERS OF THE ROADS FOR ST. PAUL'S PARISH.

The Commissioners of Roads issued execution for a fine and levied on plaintiffs goods; writ of replevin, for re-delivery of the goods so levied on, was quashed.

THE plaintiff having been fined by the board of commissioners and having failed to pay the fine, the commissioners issued an execution against his goods and levied on them. He obtained a writ of replevin and the sheriff re-delivered his goods. A motion was made before Mr. Justice Colcock to quash the writ, which was granted. A motion is now made to set aside that order, on the ground that replevin will lie in this case.

The opinion of the court was delivered by Mr. Justice Colcock.

After the repeated adjudications which have been made on this subject, I did not suppose any doubt could remain. The principle is well established that replevin will not lie in such cases. If an individual is unjustly deprived of his property by the illegal determination of inferior tribunals, there is no doubt an

BROWN, vs. DUNCAN.

action will lie against them; but a more effectual mode is to restrain them by prohibition, which may be done whenever they attempt to exceed their jurisdiction; and the appellant was well aware of his right to this remedy, for he actually exercised it in this very case, (as I suppose) at all events in a case against the commissioners of the roads. The subject is so well and so elaborately treated by my brother Bay, in the case of *Grist and Cole, 2 Nott and Mc Cord*, that it is unnecessary to attempt any further illustration of it. The motion is dismissed.

Nott and Richardson, Justices concurred.

EDWARD BROWN vs. JOHN DUNCAN.

The stat. of 8 Anne, C. 14, authorising lessors to distrain, for rent in arrear, on goods which have been clandestinely removed from the demised premises, within five days after their removal, does not relate to goods which were removed before the rent became due.

This action was brought to recover damages from the defendant, for illegally distraining upon the plaintiff's property, for rent in arrear. The plaintiff alleged, 1st. That at the time of the distress, no rent was due; 2nd. If rent was due, that the plaintiff distrained illegally, as the property levied upon was in another house, not on the demised premises, and not taken until after the expiration of five days from the time of its removal; 3rd. That after the expiration of the five days, the plaintiff could not distrain, unless the property had been clandestinely removed, whereas in this case the removal was open and notice of it given to the plaintiff. The defendant contended, 1st. That the plaintiff had neither property nor possession, nor even the right of possession in the goods which had been distrained upon; 2nd. That rent was due to him by the defendant, for which he had distrained; 3rd. That he had distrained before the expiration of five days from the time when the goods were removed; 4th. That even if the levy had been made after the expiration of five days, it was legal, as the plaintiff removed the goods fraudulently and clandestinely from the premises of the defendant.

BROWN, vs. DUNCAN.

Various testimony was introduced in support of the grounds relied on by the plaintiff and defendant: But the only testimony material to the understanding of the opinion of the court, was that the goods had been removed a few days before the rent became due.

The jury found a verdict for the defendant.

A new trial was now moved, on the grounds taken on the trial below.

The opinion of the court was delivered by Mr. Justice Richardson.

In the discussion of the grounds taken in this case, a question grew out of them which although it does not appear to have been specifically discussed at the trial below, nevertheless comes within the scope of the grounds taken against the verdict and precludes the necessity of considering any other question in the case. The rent became due on the 15th November, 1823; the goods had been removed from the demised premises upon the 12th, 13th or 14th of the same month, and the distress for the rent was made on the 19th. The rent having been in arrear on the 15th, the question is, could the landlord distrain at any time upon goods removed before the 15th November. This depends upon the second clause of the statute 8 *Anne*, c. 14; *P. L.* 98, which is in these words: "And in case any lessee," &c. &c. "upon the demise whereof any rents are, or shall be reserved," &c. shall fraudulently convey or carry off from such demised premises his goods or chattels, with intent to prevent the lessor from distraining for arrears of such rent so reserved, &c. "it shall and may be lawful to and for such lessor," &c. "within the space of five days, next ensuing such conveying away such goods," &c. "to take and seize such goods wherever the same shall be found, as a distress for the said arrears of such rent," &c. &c.

As the law stood before the statute, the landlord could distrain such goods only as were found on the premises after the rent had become due. But it was found that the goods were frequently removed after they had become liable to the distress,

BROWN, vs. DUNCAN.

but before the landlord could exercise that right; and the statute with great reason extends the right of distraining to any place to which the goods may have been removed, but evidently never intended to extend the right to goods which never had been liable to the distress before they were removed from the demised premises. The important words are, "with intent to prevent the landlord from distraining for arrears of rent," clearly meaning rent due at the moment of removal. If the statute had intended to render the removed goods liable, although not liable when removed from the demised premises, then the limitation to five days after the removal would be very ineffectual, as it is easy to remove them six or seven days before the rent becomes due, so that the distress cannot be made within five days after the removal. If it had been intended to extend the right of distress to goods removed before the rent became in arrear, then the limitation would have been to five days after the rent was due, and not five days after the removal of the goods. The moment the rent is due, the landlord has a right to distrain. He has a species of lien upon the goods within the premises, and the statute preserves this lien for five days, although the goods should have been clandestinely removed, and extends it to the place of removal. But it creates no new lien upon goods removed before the rent was due, and upon which there never was any lien or right of distress, even when within the premises demised. (*see Watson, vs. Mair, 3 Esp. Rep. 15.*) The motion is therefore granted.

Bay, Nott, and Gantt, Justices, concurred,

Clarke, and Eckhard, for the motion.

Dawson, contra.

THE CITY COUNCIL AND OTHERS, *ads.* FLOWDEN WESTON
AND OTHERS.

A tax imposed by the City council of Charleston upon the six and seven per cent stock of the United States, held not to be repugnant to the constitution of the United States.

This was a motion at chambers for a prohibition, to restrain the City council of Charleston and its officers from levying a tax imposed by a City Ordinance upon the six and seven per cent. stock of the United States, belonging to the plaintiffs.

The counsel for the plaintiffs moved for a prohibition, upon the ground that the ordinance of the city was illegal, unconstitutional and void. Judge Bay, after hearing the counsel on both sides, ordered that a writ of prohibition should issue against the City Council and its officers, as prayed for in the suggestion filed by the plaintiffs.*

The City Council appealed to the Constitutional Court from this decision, upon the ground on which the motion for a prohibition was opposed at chambers.

The opinion of the court was delivered by Mr. Justice Richardson.

The clause of the act of the City Council upon which this case depends is in the following words: "All personal estate consisting of bonds, notes, &c. &c. six and seven per cent. stock of the United States or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid, except &c. &c. twenty five cents on every hundred dollars." The act lays the tax of twenty-five cents per hundred dollars upon such stock only as bears a neat annual interest or profit to the owner. And the question to be considered is, may the annual profit or interest of the six per cent. stock of the United States, be taxed in the hands of individual citizens, without violating the constitution of the United States. If the right to tax such stock be not inconsistent with the express limitation of the powers of the individual states to levy taxes, nor inconsistent with the powers delegated to congress by the constitution, no prohibition can be

* This case was argued at the spring term 1823. The reporter did not hear the argument.

CITY COUNCIL, *ads.* PLOWDEN & WESTON.

issued. For such stock being the subject matter of property, the revenue derived from it is in this respect, like any other income belonging to the citizen, a subject for legitimate taxation, unless shielded from the common burthen of taxes by the Federal constitution. The determination of the question depends then upon two considerations:

1st. Does the constitution lay any express restrictions, applicable to the tax in question, upon the power inherent in the state sovereignties to levy taxes at their discretion; or

2dly. Does such a restriction necessarily arise out of the essential rights or superintending control conferred upon the government of the United States.

The only express limitations to the power of the individual states, to levy and collect taxes, is found in the 18th section of the 1st article of the constitution of the United States, in these words: "No state shall, without the consent of congress, lay any impost or duties on imports or exports, except." &c. &c. "No state shall, without the consent of congress, lay any duty of tonnage," &c. But there is nothing in those limitations which can mingle itself with the question before us. And we may come at once at the only true ground of controversy, i. e. the constructive restriction, unavoidably arising out of the powers of the United States government, as delegated by the constitution.

Judicial decisions upon the rights, powers and attributes of the general and state governments, wherever the constitution is silent, will often form a topic of much feeling and interest to the people and of great moment to the Union. So much so, that it has occurred to my mind as a peculiar and unanswerable reason, arising out of our system of government, why the American judiciaries, both state and federal, even more than any other judicial tribunals on earth, should be so constituted as to stand independent of temporary excitement and unswayed by pride, popular opinion or party spirit, which must in every country from the very nature of man, pervade and influence: more or less, every department of government! But which among us, being the natural offspring of the free institu-

CITY COUNCIL, *ads.* PLOWDEN & WESTON.

tions we prize so highly, and thus claiming a right as by inheritance to be heard, assert their influence, if they do not frequently direct and govern the firmest minds. And yet while we preserve the principle of judicial independence, I would say also to the pervading force of public opinion, "esto perpetua."

Every question therefore having for its object the construction of the respective powers of the general and state governments, demands a full and impartial consideration, regarding conflicting interests equally and fearlessly, and directing a steady aim to the final purposes to which the decision may be subservient.

But to return to the argument: Although as a general rule, the disadvantages finally attending a tax upon stock, by driving away a species of property so moveable, have been acknowledged, yet the right of all governments to tax every kind of property or income, may be assumed as an incontrovertible principle: and as we find no express limitation affecting the particular question before us, we are to enquire if there is necessarily any constructive restriction arising out of the constitution.

It is urged that congress having a right to borrow money, the exercise of which right is an essential instrument in the operations of the government, the tax in question has a tendency to impair and might, if allowed, put a stop finally to the practical right of borrowing, and is therefore unconstitutional. Here then two unquestionable rights are supposed to be in collision; the right to borrow money on the one side, and the right to tax on the other. In reconciling conflicting rights, or in laying down the constitutional line of demarcation in such instances, although we are not to anticipate that perfect harmony and forbearance will be always practised between the general and state governments, yet we are not to presuppose hostility. There is between them a rational confidence, naturally arising out of their relative situation, mutual interest and reciprocal dependence, similar to that existing between the different departments of the same government, which while they watch and check each other, do yet, and with great reason, confide in the

CITY COUNCIL, *ads.* PLOWDEN WESTON.

Integrity, sound sense and good dispositions of each member. Guided then in the enquiry by a proper sense of the character of the governments which form our entire system, let us weigh the arguments presented by the case.

The plaintiffs urge that their objection to the tax is supported by the doctrine established in the case of *McCulloch, vs. The State of Maryland*, 4th Wheaton, p. 316, which decides that the state governments cannot tax the means constitutionally employed by the government of the United States to carry into operation any of its essential powers. The court there declared that the Bank of the United States could not be taxed by the States, because that institution was a constitutional instrument or means of carrying into effect the allowed powers of the general government. But the judges say (p. 436.) "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank," &c. &c. "nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution," &c. &c. Now it is evident that the tax laid by the city council comes within the distinction here recognized and allowed. The tax laid by Maryland, being upon the institution itself, was unconstitutional; but the court plainly say, that if the tax had been upon the interest of an individual stockholder, it would have been constitutional. The distinction is manifest and palpable to the understanding. The bank itself cannot be taxed, because that would be to tax the means of the government and to clog its constitutional operations; but to tax the portion of stock which belongs to an individual is not to tax the institution itself, nor in any way to clog the operations of the government: and the interest paid annually to the stockholders, when received by them, has no longer any connection with the bank, but then becomes money belonging to individuals in severalty, and when so situated is liable of course to be taxed like any other piece of property belonging to an individual which is enjoyed under the protection of the state governments. The judges by way of illustration, say, p. 423, "If the tax, as stood, were allowed, the state might tax any other instrument of

CITY COUNCIL, *ads.* PLOWDEN WESTON.

the government, as the mint, &c. and defeat all the ends of government." But assuredly they never meant that the money coined at the mint, after being paid into the hands of a citizen, was not a subject of taxation. Congress cannot be taxed, but the individual members may be all taxed in the states which protect them. The army of the United States cannot be taxed, but who can question that the arms and munitions of war, if disposed of, may be taxed in the hands of individual purchasers. The lands belonging to the United States are a vast source of revenue and constitute the means of government, but when sold, are all liable to taxes. In like manner, although the right to borrow money, or more properly the operation or contract of borrowing as practised by the United States, cannot be taxed, yet the interest or income of the loan, when once paid into the hands of individual lenders, being no longer an instrument of government, is liable to the common burthen of taxes like any other dollars and cents. Suppose for a moment, instead of paying six or seven dollars per annum, the United States had contracted to pay six or seven acres of land for the use of \$100, as long as the money remained unpaid, could not the land when conveyed to the lender be taxed, and where is the difference between a premium paid in silver and one in land? If land paid to a soldier for services can be taxed, land paid to him for money lent may be equally taxed. And why not the silver received by him? There can be no difference. We cannot tax the mines of Peru or Mexico, but can there be a more legitimate subject of taxation than the gold and silver of South America, if owned here and under the protection of the state?

But it is further urged that if the tax of the City Council be constitutional, capitalists will be deterred, if not prevented by the high taxes from lending money to the United States; and it must be admitted that if the property derived from the United States were to be exempt from all future taxes, it would enable the government to sell to great advantage. But it would be a privilege without any equivalent, allowed to no other seller, and which would not only greatly dry up the sources of taxes, but directly impede the indispensable right of every state sever-

CITY COUNCIL, *ads.* PLOWDEN WESTON.

eighty to draw upon the wealth of its citizens, from whatever source derived, in order to answer its own prosperity and safety. If the tax had been laid as a penalty upon the contract of lending to the United States, it might have been then said to impair the right of borrowing.

But here the tax is upon the enjoyment of the interest under state protection; and enjoyment and protection being the peculiar incidents which justify taxation, it matters not whence the property was derived. All the property of any individual, enjoyed and protected under the state government, is the subject of taxation, at the discretion of the proper department.

Here let me remark that the twenty-four states which constitute the United States are themselves so many independent nations; each retaining every national power, except where restricted by the federal constitution. And any power, though delegated to congress, is yet, if not expressly taken from the states, reserved, and may be concurrently exercised, both by the state and general governments; unless the exercise of such power by the states be inconsistent with the use of it by the United States. For instance, "congress has power to lay and collect taxes, pay debts," &c. &c. "provide for the common defence," &c. "borrow money, promote the progress of science, provide for calling out the militia, arming them," &c. &c. *1st. article, 8th. section of the constitution* And yet all the same powers belong to the states individually, and their governments may exercise them without restriction. To this general rule, the only proper exceptions are, where any exercise of power by the states would raise a barrier against the operation of a law of the United States, as if the states were to enact rules to regulate foreign commerce, or for the naturalization of foreigners, different from those of the United States. In such case, the laws of the United States would, by the 6th article of the constitution, be supreme, and bind this court as well as those of the United States. At the same time, it is true that whenever money is drawn from the citizen in any way by the states, it may be said to lessen, in some degree, the amount which the general government might otherwise obtain from the same

CITY COUNCIL, *ads.* PLOWDEN WESTON.

source; and if you press the principal to an extreme, the general government might thereby be deprived of all the means of direct taxation by the exactions of the states; and *mutatis mutandis*, the states equally deprived by congress: and yet there can be no restriction upon either. But need we really fear lest they should by such folly, verify the just observation "that excessive taxation is a monster which after devouring every thing else, devours itself at last." Or can there be the least cause for alarm to the United States, seeing that the evil consequences of the tax must recoil upon ourselves, by driving the stock out of Charleston; and thus by depriving the people there of this species of property, exemplify the known objection to such taxes. But it never can prevent the loan of money to the United States, at least not in a greater degree than the practice of taxing lands must unavoidably lessen the success of the sales made by the United States, as well as of those made by other proprietors.

When we acquire any interest whatever, we look to government for protection in the use of it, and taxes are the consideration to be paid in return. Such annual tribute is the premium paid for assured enjoyment. However evident it may be moreover, that the United States could not in good faith, tax the interest they have themselves contracted to pay the lenders; and however comity between dependent governments and the apprehension of raising up a spirit of retaliation, ought to prevent such a tax on the part of the individual states, yet such views and fears cannot alter the constitutional right to tax, and are not for our consideration.

It has been also argued, that the tax in question impairs the obligation on contracts, by diminishing the profits of the lender, and thereby impugns another limitation of the power of the individual states; 10th. section 1st. article of the constitution; but the answer to this objection is satisfactory and already implied. Every person who purchases property, takes it subject to the taxes that may be laid by the government which protects it. The tax arises after the purchase, and is according to the exigency of the occasion. The land purchased of the United States to day, though not liable in their hands to any taxes.

CITY COUNCIL, *ads.* PLOWDEN WESTON.

may be taxed in the hands of the purchaser to-morrow, to more than its value. Or the bond received as a security for the purchase-money of property, or for the payment of a loan of money, may in like manner be taxed to any extent required by the government. In civilized society, taxes constitute the price of protection and are as inseparable from property as obedience is from the citizen. In this respect, there can be no difference between property derived from, or a contract with the United States, and an individual. If indeed the stock of the United States, belonging to a citizen, could in no way be taxed, our government might present the political solecism of individuals protected in the use and enjoyment of their property, yet exempt of right from any contributions to the government protecting; without any equivalent paid for so extraordinary an exemption from the common burthen. How, let me ask, would such a prerogative in a citizen, comport with the essential principle laid down by the modern parent of sound political economy, (*A Smith, vol. 3 p. 256.*) that "the subjects of every state ought to contribute towards the support of the government, in proportion to the revenue which they respectively enjoy under the protection of the state," which as a rule of justice and equality, he illustrates by observing, "that the expense of government to the individuals of a great nation, is like the expense of management to the joint-tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate." And, although in practice, some persons may escape, yet the power to make all contribute equally, is indispensable to good government. I cannot perceive then that any of the arguments used, bear out the conclusion that the tax laid by the City Council is unconstitutional, although they may prove it unwise. I have endeavoured to place the decision of the court upon allowed principles; and to shew that it comes within the distinction admitted in the case of *M'Culloch vs. Maryland*, rather than protect it by the decision of this court in the case of *Bulow and others vs. the City Council*, 1 *Nott & M'Cord*, p. 527,) which supports our present decision to its full extent. But however, in my own judgment, just and

CITY COUNCIL, *ads.* PLOWDEN WESTON.

rational, constitutional, safe and already adjudged, I am warned by the great difference of opinion upon the bench, that the conclusion at which a majority of the court has arrived may still be erroneous. And when there is so much difference of opinion, it is satisfactory to know that the correctness of the decision may be yet tested before the tribunal created under the constitution, to decide finally such questions. But until the supreme court of the United States shall have so declared, I cannot believe that they ever intended, by the decision in the case of *McCulloch, vs. Maryland*, to interfere with the right of the states to tax their own private citizens in any way, to any extent, upon any individual property, right or interest whatever. On the contrary, they admit the right to the fullest extent, and only require that in the exercise of it, the states shall not reach their object by taxing the means necessarily used in the practical operations of the general government. The tax laid by the City Council being considered constitutional, the order made by the presiding judge is reversed and the motion of the appellants granted.

Huger, Justice.

This was an application for a prohibition to restrain the treasurer of the City of Charleston from levying a tax imposed by a city ordinance on 6 and 7 per cent stock of the United States.

The words of the ordinance are, "All personal estate, consisting of bonds, notes," &c. &c. "6 and 7 per cent stock of the United States, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid, except," &c. &c. "twenty-five cents on every hundred dollars."

The prohibition was ordered. A motion is now submitted for the reversal of that order. I am unwilling on so important a question, merely to express my dissent from the judgment of the court. It is now for the first time agitated and ought to be fully discussed, that it may be the better understood. It affects the use of a power as essential to the general government in periods of difficulty and danger as any other which the people have delegated to it. If the city council of Charleston can tax

CITY COUNCIL, *ads.* PLOWDEN WESTON.

the stock of the United States, *eo nomine*, the states can, and if the states can, it is impossible not to perceive that the fiscal operations of the general government may be completely frustrated by the states. It will be in vain for congress to pass acts authorising the secretary of the treasury to borrow money, if the holders of their stock can be taxed by the states for having lent. Congress may offer 10 per cent. for loans, but who will lend if the states can appropriate the whole to their use. Whether the states will do so or not may be problematical, but if they can do so, the risk of their doing so must be covered by the terms on which the loans will be made.

There is but one substantial security for the proper administration of our governments; the immediate responsibility of their administrators to the people. If however the people have or feel no interest in the measures of a government, its administrators are only nominally responsible; they will only be checked where they act in derogation of what is understood or felt to be the interests of their constituents. Remote interests are not seen but by the better informed, and they always must present grounds for much difference of opinion even among the best informed. It is not a sufficient guard to the powers of the general government, that the constituents of the administrators of the state governments have a remote interest in the preservation of those powers, or in an unembarrassed exercise of them by the general government. They may not be seen or may not be understood, and the very case before us presents a full illustration of this truth. No government, not revolutionary, has ever attempted to tax its own stock, and among others for two very satisfactory reasons:

1st. Because such a tax must necessarily operate injuriously upon all future loans, and

2dly, Because there is in fact a violation of contract in so doing, and therefore such tax is immoral and impolitic.

Under the influence of these reasons, the legislature of this state has refused to tax the stock of the United States, but it appears that the city council of Charleston have thought differently and have taxed it. There are however some very

CITY COUNCIL, *ads.* PLOWDEN WESTON.

obvious reasons why the council of Charleston should be less disposed to impose such a tax than the legislature. In the first place, the city of Charleston being commercial, is more within the influence of the policy of the general government than the legislature, the constituents of whom are generally agriculturists. In the second place, the holders of stock being generally mobied men and inhabitants of the city, must necessarily have a greater influence with the city council than with the legislature. If therefore the council of the city can believe it politic and just to tax the stock of the United States, can it be thought improbable that the legislature may do so? If they can do so at all, they may do so to any extent; it is equally within their power to tax 20 per cent. or 100 per cent. as 7½ per cent. What shall govern their discretion it is impossible to foresee. A state or a few states may concur in a policy at variance with that of the government, nay in hostility to it. This unfortunately has been already witnessed. They may, indeed, be indisposed to dissolve the union and declare war, when they may have no objection to counteract congress and control its measures, by the exercise of a constitutional power. Seven tenths of the stock of the United States is owned in the cities of Boston, New-York, Philadelphia, Baltimore and Charleston. The same causes which have concentrated the stock in these cities, will in all probability continue to operate, and the greater part of future loans will be effected there. Should therefore even so small a portion of the United States as these cities, unite in taxing stock to any considerable amount, the government may be defeated, and will certainly be impeded in its fiscal operations, to the extent of any tax imposed. It may be supposed that these cities would be checked in such proceedings by their state legislatures. Whether this could be done, must depend upon the constitutions of the states and the charters of the cities. It may not suit the prevailing policy of a state to interfere in such a case, even if it possesses the power. We know from the charter of the city of Charleston, that the legislature of this state can interfere and repeal the ordinance in question; this, however, has not been done, although they have

CITY COUNCIL, *ads.* PLOWDEN WESTON.

refused to impose such a tax themselves, and though South-Carolina is, has always been, and I hope will ever continue to be as national as any state in the Union.

It may be said, that admit all this to be true, it cannot effect the question before the court; who are called upon to decide what the constitution is, and not what it ought to be. The judicial branch of the government most certainly does not possess the power of legislating, much less then can they claim the power of making a constitution. But in construing the constitution, they must look to the objects it professes to attain, and they cannot so construe it as to defeat the very end and aim of its creation, nor should they make it inconsistent with itself if it be possible to avoid it. The general powers of congress may be sufficiently designated in the constitution, but the extent and ramifications of each power it was not in the wisdom of man to foresee and precisely describe. How they are to operate and exhibit themselves, must depend upon the future contingent circumstances of the nation; and as these must be forever varying, constitutional questions or doubts must arise as long as the constitution shall exist. These are the certain and legitimate consequences of a written constitution. The numerous questions which the statute of frauds has given rise to, simple as was its object, may afford some intimation of the number which an instrument, so complicated and general in its objects as the constitution may be expected to produce. The great difficulty is, not only in ascertaining and defining the powers which result from those which are expressly given to the government, but (as in this case and in that of the Bank of the United States) in determining the influence of these on the powers of the different states. In the decision of such cases there must necessarily be an extended construction which may bear the semblance of legislation. I am not conscious of even a desire to extend unnecessarily the powers of the judiciary; the pursuits and habits of near twenty years, by far the better part of my life, have given at least to my feelings a direction decidedly favorable to the legislative branch of the government. When attached in fact as I was in

CITY COUNCIL, *ads.* PLOWDEN WESTON.

feeling to that branch, I could not but discern the importance of the judicial branch of the government, and the necessity of leaving to its decision all questions like the one before the court, though they savoured of legislation. I shall certainly not omit to do now what I formerly regarded as incumbent upon the judiciary to perform.

I shall now proceed to enquire:

1st. Whether the tax in question be an income tax. That it is not, appears very clearly from the facts of the case, as well as from the terms of the ordinance. The stock of the state; the stock of the city; bank stock universally, as well as the profits of agriculture, enjoyed by those who reside in the city, are not taxed: nor does the ordinance affect to regard it as an income tax. It is a tax upon the United States stock, *eo nomine*. As this is not a tax upon income, it is unnecessary to enquire if the city council or a state have the power to tax income, and include therein the interest received on United States stock. I shall therefore proceed to enquire if the city council or a state have the power to tax United States stock, *eo nomine*.

The first question presented by the enquiry is, what is the meaning of the term United States stock? It is, I apprehend, a credit on the government for so much money, on which they have agreed to pay a certain interest. He who has the credit is the holder, and the certificate is the evidence of the credit and the terms on which the credit has been given. The power to create this credit is expressly given by the 8th section of the first article of the constitution of the United States: "Congress shall have power to borrow money on the credit of the United States." The credit of the United States is the essence of the stock, without it the stock is of no value. The credit of the United States is a creation of the general government, which did not exist until they brought it into being, and in the production of which the state governments did not participate. The state could not tax it before the constitution was formed, for it did not exist; if therefore they can tax it now, it must be by some new power vested in them by that instrument, but there

CITY COUNCIL, *ads.* PLOWDEN WESTON.

is no such power given: the credit of the United States cannot be taxed by the states.

It is contended that to deny the states a power to tax money loaned to the general government, is to deprive them of a great resource, without any adequate object. In the first place, I must observe that if the states cannot tax the stock of the United States, the general government will be able to borrow on better terms, and in this way the people of the United States will be compensated for any inconvenience that might result from the exemption of the stock from the taxation of the state governments. In the second place, I must repeat they have no cause to complain, because it is a creation of the general government which the states did not possess before its establishment. But on this subject, I cannot but think that a very erroneous opinion prevails. It appears to be thought that for every thousand dollars loaned to the general government, so much taxable property has been withdrawn from the states. But this is certainly not so: of the \$100,000,000 loaned to the general government during the late war, how much of it remains with the government? Not one cent. Where then is it? Certainly in the states. If a certain number of individuals paid it into the treasury of the United States, the government has returned it to individuals living in the different states, and if liable to taxation at all, can now be taxed by the states. If the general government had been foreign to the state governments, or had they hoarded it up, this objection might have had some force; but as fast as they got it, they returned it, and no means of the state governments were affected, but by an increased difficulty of borrowing money, owing to the competition of the general government.

One of the great objects of the constitution was to render the general government independent of the state governments for those pecuniary means which are necessary to effect the great purpose for which it was established, viz. to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defence, promote the general welfare, &c. &c. If however means so essential in periods of distress

CITY COUNCIL, *ads.* PLOWDEN WESTON.

and danger as loans, can be controuled by the states, congress is yet essentially dependent upon the states. There is another objection to this tax. I regard it as a violation of the contract made with the holders of the United States stock. The people of the United States, of whom the citizens of Charleston are a part, have contracted to pay so much per cent on the stock, by their agents, the general government. To authorise the citizens of Charleston to deduct a part from the interest agreed upon, they must possess the power of altering the contract, without the consent of the holder of the stock; which would be a violation of the obligation of the contract. But the constitution expressly declares, they shall not violate the obligation of contracts. To recapitulate my objections to the tax, they are:

1st. Because a tax upon stock of the United States, *eo nomine*, is a tax upon the credit of the United States.

2nd. Because the credit of the United States was not a subject for taxation by the states anterior to the adoption of the constitution; the credit of the United States being a result of the establishment of the government of the United States, and the constitution has given no new powers to the state governments.

3rd. Because the objects of taxation by the state governments are not diminished by withholding from them the power of taxing stock of the United States; as the money borrowed by the United States is immediately, by disbursements, returned to the people of the different States.

4th. Because it renders the general government dependent upon the discretion of the state governments for one of its essential means, in accomplishing the purposes for which it was established; a result at variance with one of the principal objects of the constitution, which was to render the general government independent of the pecuniary aid of the state governments; and lastly,

Because it is a violation of the obligation of contracts.

Nott and Bay, justices concurred in the above dissenting opinion.

Drayton, for motion.

Hayne, contra.

SUSANNA NEWCOMB, assignee, vs. DANIEL NEIL.

Defendant on being shewn a note of hand, signed by himself, did not deny the hand writing, but said that his brother, who it seems had held and transferred the note, owed him money, and he would not pay a cent of it. Held not a sufficient acknowledgment to take the note out of the statute of limitations.

THIS was an action on a due bill or note, drawn by defendant in Boston, 10th. October, 1802, for \$394 87, in favour Wm. M'Neil & Son, and assigned to the plaintiff. The hand-writing was admitted, but defendant pleaded the statute of limitations; and to take the case out of the statute, a new undertaking was alleged by the plaintiff. To prove this, the deposition of Samuel G. Sargent was taken in Boston; who deposed that he had called on defendant, then in Savannah, with the paper on which this action was brought, and informed him that he had a demand against him, at the same time exhibiting the paper to him; that the defendant said he would not pay a cent, because his brother, who it seems had transferred this note, had received all his father's property, and if the account were settled, he would owe him money. The witness further deposed, that in this conversation with the defendant, he did not deny his hand-writing, after looking over the paper; but did not recollect that he promised to pay it; adding however, if the accounts were adjusted and settled, money would be due him.

Mr. Justice Richardson, who presided in the circuit court, before which the case was tried, charged the jury that it did not appear to him that the testimony offered had taken this case out of the statute of limitations, as no explicit acknowledgment of the debt had been proved by the witness; and that to take a case out of the operation of the act, pleaded in bar of this action, some express promise, or at least an acknowledgment of the debt, should have been proved. The jury accordingly found a verdict for defendant.

The present was a motion for a new trial, on the ground of mis-direction on the part of the presiding judge.

The opinion of the court was delivered by Mr. Justice Bay.

Upon due consideration of this case, I am of opinion that the charge of the presiding judge to the jury was perfectly cor-

NEWCOMB, vs. NEIL.

rect and proper. Formerly it was held in this state, that to take a case barred by the statute of limitations out of the statute, there must be a new promise or undertaking, and that a bare acknowledgment of a debt, without such promise, was not sufficient. But in the case of *Roderiguez, vs. Fronte*, tried in January term, 1806, before the late Mr. Justice Trezevant, who had charged the jury that an acknowledgment of a debt, without such new promise, was not sufficient for that purpose, the verdict for the defendant was set aside and a new trial ordered by the constitutional court; on the ground that an acknowledgment of a subsisting debt, still due and unpaid, would take a case out of the statute of limitations; because the statute goes upon the presumption that the debt has been paid and satisfied, and an acknowledgment therefore that the debt has not been paid will rebut such presumption; 4, *East. Rep.* 599, 604; 1st. *Esp.* 157; *Peake*, 93; and many cases have been determined since upon the same principles.

With regard to the nature and import of this promise, the cases in the English books are manifold and some of them contradictory; and in general they appear to be left to the inferences and constructions of juries, according to their ideas of the subject, without any clear or definite rule to govern them. It appears to me therefore, that the rule laid down by the presiding judge in this case, is an exceeding good one; that there must be some clear and explicit acknowledgment of a subsisting debt, still due to the plaintiff, to take it out of the statute; as nothing can be more precarious than the fluctuating and uncertain opinions of juries, drawn from circumstances, without any fixed or certain rule to govern their verdicts. I am therefore clearly of opinion that the rule for a new trial in this case should be dismissed and that the verdict of the jury should remain unimpeached.

Nott, Gantt, and Huger, Justices, concurred.

FRANCIS G. DELIESSELINE, *Sheriff of Charleston district, ads.*
KING AND JONES.

A Fi. Fa. and Ca. Sa. were both lodged in the sheriff's office, with orders to proceed on the Fi. Fa. After levy made, the Sheriff was directed to proceed on the Ca. Sa. The goods levied on were sold and the proceeds paid over to older executions. Before the return day of the Ca. Sa. the debtor died insolvent, and the Ca. Sa. was never executed. Held that the Sheriff was not responsible.

From the brief which was admitted to be a true state of the case, it appears that this was a summary process against the sheriff, for the amount of a ca. sa. lodged in his office against the body of one William Wooley deceased, which the defendant omitted to execute in due time, *per quod* the plaintiffs lost their debt.

It came out in evidence that the plaintiffs, after having obtained judgment against the defendant Wooley, lodged two executions in the sheriff's office at the same time, viz: a Fi. Fa. and Ca. Sa. and that these executions were lodged on the 25th July, 1822. That about four days after the lodging of the executions, the plaintiff's attorney left orders with the clerk of the sheriff to proceed on the fi. fa. When the plaintiff's attorney called at the sheriff's office again some days after, in order to give directions to proceed against the body of the defendant, the executions were not in the sheriff's office, but were in the hands of the deputy sheriff, Bonner; who had made a levy on defendant's goods before he received instructions to proceed against the body of defendant. It appeared that when Mr. Bonner received instructions to proceed on the ca. sa. against the defendant, he said the money should be forth coming. From the testimony of the deputy, Bonner, it appeared that the levy was actually made on defendant's goods, before he received the order to proceed on the ca. sa. though the levy was endorsed on the fi. fa. as of the 14th of August. The goods were not removed from the store until after the death of Wooley, which happened about the middle of Sept. 1822. The proceeds of the goods, after sale, were paid over to prior executions, and it was admitted that Wooley died insolvent. The presiding judge decreed for the plaintiffs against the sheriff, the amount of the debt and costs, and the

DELIESSELINE, *ads.* KING & JONES.

present was a motion to set aside that decree and for a new trial.

Delessieline, for the motion, argued that in an action for an escape against the sheriff, plaintiff can recover no more than to the amount of the injury actually sustained. 1, *Johns. Re.* 214. Wooley was insolvent and therefore plaintiff lost nothing. The death of Wooley insolvent, strengthens the conclusion that the neglect of the sheriff, if there was such neglect, was *damnum absque insuria*.

The presumption is in favor of the officer, and the plaintiff should have proved that it was in the power of defendant to have arrested Wooley before his death.

Clarke, *contra*. The witness Bonner was inconsistent with himself, he is contradicted by his own return and does not deserve credit. It is the duty of the sheriff to return the goods levied on, by endorsement on the *fi. fa.* 1 *Bay*, 314; there is such a return and the levy was contrary to instructions.

The sheriff is bound to execute process in the most effectual way. If defendant do not abscond, but remains at home in his usual occupations, the return of non est inventus cannot be justified; and if the party turns out insolvent, the sheriff will be answerable for the whole amount. In this case the party remained at home until his death; if the sheriff had arrested him it is almost certain that the debt would have been saved. *Cited*, 1 *Esp. Rep.* 475; 6 *Bac. Ab.* 165; 1 *Day*, 128; 1 *Str.* 650; 1 *Bos. & Pul.* 27; 1 *Johns. Rep.* 215.

The opinion of the court was delivered by Mr. Justice Bay.

This is not so much a case of importance on account of the sum depending on the opinion of the court, as it is in principle, involving the responsibility of the sheriffs of the state. The law supposes that one who undertakes any office or employment, trust or duty, either of a public or private nature, contracts with those who employ him or entrust him to perform it with integrity, diligence and skill; and if by his want of either of those qualities, any injury accrues to individuals, they have therefore their remedy in damages, by a special action on the

DELESSIELINE, *ads.* KING & JONES.

case. By the law, every sheriff is obliged to execute every writ and process directed to him by lawful authority with all convenient expedition, as soon after he receives it as the nature of the thing will admit of; and as on the one hand, he is not to show any favor or be guilty of any unreasonable delay; so on the other hand, he must not be guilty of any unnecessary rigour or oppression. *Dalt. Shff.* 109; 6 *Bacon*, 168.

Having laid down these few general out lines respecting the nature and duty of the office of sheriff, I shall proceed to consider the principles of the case under consideration. In this case then, it appears that two executions were taken out and lodged in the office at the same time, viz. a fi. fa. and a ca. sa. with orders from the plaintiff's attorney to proceed on the fi. fa. in the first instance. Formerly these two executions could not be taken out at the same time against the defendant, for lord chief baron Gilbert lays it down in his law of executions, p. 71, that the capias is instead of the fieri facias, and if the fieri facias issues first, no capias ought to issue, because the debt may be satisfied by the fieri facias and then he ought not to have a pledge in his hands from whence he is to have other satisfaction. *Law of Executions*; 71, for this in fact would be putting it in the plaintiff's power to obtain double satisfaction. But in process of time, the courts permitted the plaintiff, for his own security, to take out two writs, the fi. fa. and the ca. sa. at the same time, but permitted him to execute but one of them. 8 *Modern*, 302. He is bound to make his election, for where a plaintiff proceeded on both at the same time, both were quashed and set aside. 1. *Camp*, 334; 1. *Vesey*, 194; *Barne's notes*, 198. Now in the present case, it appears that the plaintiff's attorney, when he lodged the executions in the office, did make his election, by giving orders to the sheriff to proceed on the fi. fa. and further, that the sheriff did promptly and without delay proceed upon this fi. fa. by making a levy on the defendant's goods in his store, for the purpose of satisfying that execution. It is true that the goods levied upon did not pay off all the demands against the defendant. but the sheriff appropriated the proceeds to the satisfaction of prior executions, as by the Law he was bound

DELESSIELINE, *ads.* KING & JONES.

to do. While these proceedings were in transitu under the *fi. fa.* and before any returns could be made on the *fi. fa.* at the suit of the plaintiffs, and before the goods were sold, the plaintiffs' attorney called at the sheriff's office and countermanded the proceedings under the *fi. fa.* and gave directions to the sheriff to proceed upon the *ca. sa.* against the body of defendant. In the mean time however, the defendant died and paid his last debt about the middle of September, a little more than one month after these executions were lodged, and long before the return day to the Court of Common Pleas had come round, and it was admitted on all sides that he died in insolvent circumstances. At this stage of the case, a question arises under this novel practice of the courts, in allowing two executions to be taken out and lodged in the sheriff's office at the same time; and that is, whether a sheriff is to be liable to the whims and caprices of every plaintiff who thinks proper to lodge two executions against a defendant at the same time, by changing the directions from proceeding on the one to the other, as he may think proper to direct; or whether he is bound to follow the first and original orders of the plaintiff, when they are lodged, until the result is known. It must be recollected that this double remedy was unknown to the ancient principles of the common law, and since its introduction by the permission of the courts of justice, it is confined to one or the other remedy at the same time only, and in my opinion both cannot be used together; so that when one is made use of for recovery or satisfaction of the plaintiff's demand, the other is quiescent or inoperative till the result of the other is known; which never can be determined till the return of the sheriff at the court to which they are made returnable. If the plaintiff proceeds on his *ca. sa.* and takes the body of defendant, that is the highest satisfaction, and he shall never have any further execution against him, unless he dies in gaol; then, on reviving the judgment, he may have a *fi. fa.* against his goods and chattels, if any are to be found. But if on the other hand, he proceeds by *fi. fa.* in the first instance, and levies on defendant's goods and chattels, he shall not have the benefit of the *ca. sa.* until the return of the *fi.*

DELESSIELINE, *ads.* KING & JONES.

fa. and it is ascertained whether the goods, &c. levied on are sufficient to pay the debt or not. Then indeed, if the goods are insufficient, he may have his *capias* for the body, to satisfy the balance which may still be due or unpaid; or the whole of the debt, if all the goods are exhausted by prior executions. If however he makes use of his *ca. sa.* before the return of the *fi fa.* then it is using them both at the same time; which is contrary to law, and both are liable to be quashed, as mentioned in the authorities before laid down. In the present case, it appears that the plaintiff did give orders to the sheriff to proceed on the *ca. sa.* while the *fi. fa.* was in the hands of the bailiff, and while the goods levied on remained unsold in the defendant's store; but this *ca. sa.* was never served, as the defendant, Wooley, died immediately after the orders given to proceed on the *ca. sa.* or about the same time. I am however, clearly of opinion that this order to proceed on the *ca. sa.* was irregular under the foregoing circumstances; and that if it had been served on the defendant, before he died, both executions would have been liable to be quashed. Thus far I have considered the law upon lodging two executions in the sheriff's office at the same time, and the principles by which they are to be respectively governed.

The next point for consideration is, whether the sheriff can be made responsible for a debt under the foregoing circumstances, and also to what extent he is responsible. If the sheriff can be made responsible in this case, it must be for nonfeasance. He has not been charged with any escape or false return or any thing else that will amount in law to a misfeasance. As to his conduct in executing the *fi. fa.* which he had orders first to proceed upon, he is not chargeable with any omission or neglect of duty in executing that process; it is not even alleged by the plaintiffs themselves, that he had been guilty of neglect; for it appears that he obeyed the mandate of the *fi. fa.* promptly and without delay, by making a levy on the goods of the defendant's store; and the bailiff, Bonner, proved that this levy was made on the goods in the store before any orders were given to proceed upon the *ca. sa.* so that it is very evident he was not guilty of any neglect in proceeding on the *fi. fa.* agreeably to

DELESSIELINE, *ads.* KING & JONES.

the first orders given; and if the plaintiff did not obtain satisfaction of his debt from the levy under the *fi. fa.* it was not the sheriff's fault; the amount of sales was absorbed by prior executions, which could only be known after the sales were made and closed. Then as to the *ca. sa.* if the foregoing rules are correct, it would have been illegal in the sheriff to have taken the body of defendant, while the proceedings were going on under the *fi. fa.* and until there was a return of that execution; and if the sheriff had proceeded on the *ca. sa.* and taken the defendant's body while the *fi. fa.* was in active operation, it would have been proceeding on both executions at the same time, contrary to law, and the sheriff would have been liable for false imprisonment. But the act of God prevented him from obeying the orders of the plaintiff, by the defendant's death, and here was an end of the *ca. sa.* and all orders under it. From this view of the subject then, it does not appear to me that the sheriff was guilty of any culpable omission of duty for not serving this *ca. pi.* on defendant.

The next branch of this second division of the subject is, admitting for argument sake, that the sheriff could be made liable for not arresting the defendant on the *ca. sa.* to what extent is he liable? Upon this point the law is clear, that if a sheriff does not execute a writ lawfully delivered to him or makes a false return or suffers a prisoner to escape, he is liable to an action for damages, to be assessed by a jury; or if after judgment, a gaoler or sheriff permits a debtor to escape, the debt becomes his own, as laid down in 3 *Blackstone* 165, and he is liable for the whole debt. In estimating or assessing these damages however by a jury, in the case of *Bonafous, vs. Walker*, it is laid down that the party who suffers by an escape or false return, shall have the same remedy against the gaoler or sheriff, which he could have had against the original debtor; 2 *Term Rep.* 132. and Buller, in his opinion in that case, says that the party who suffers by an escape, shall have the same remedy against the gaoler, as against the debtor, but he cannot recover more than he could have recovered against the original debtor. Grose, J. That in an action for an escape, the jury are

DELESSIELINE, *ads.* KING & JONES.

at liberty to give such damages as they shall think right, under all circumstances of the case, and a shilling is frequently sufficient; for many cases arise of great hardship against a gaoler. Ashurst, J. declared himself of the same opinion. In *first Johnson's N. Y. Reports*, 316, it is laid down that the poverty of one Briggs, the defendant, who escaped and who was proved to be insolvent, might be given in evidence and considered by the jury in mitigation of damages against a sheriff. From the authorities last quoted, it appears evident that the damages against a sheriff for negligence or nonfeasance ought to depend on the capacity or ability of debtor escaping to pay and satisfy the debt for which he was imprisoned; that is, if he the defendant was able to pay the debt, had he been kept in custody, then the sheriff should be made liable for the whole amount; but if on the contrary, he was poor and in insolvent circumstances; he should be discharged or let off with mere nominal damages. Wherever a sheriff acts with reasonable diligence and attention to his duty, he deserves the protection of a court and jury, and it would be cruel and unjust to subject him to the payment of a large sum of money, for a man who was totally unable to pay a cent. I have only quoted the above authorities to shew how damages are to be regulated where a defendant was legally in custody and escaped from a sheriff or gaoler.

A third ground taken against the sheriff was, that the bailiff said the money should be forth-coming. This was the declaration of the bailiff, and not one of his acts on behalf of his principal, the sheriff, and I know of no law which says the sheriff shall be liable for the words of a bailiff, further than as they are evidence of some act done by him in the line of his duty; now this declaration was not evincive of any act done by the bailiff, only that the money should be forth-coming. Make the most of it and it cannot amount to more than a promise on the part of the bailiff, that the money should be forth-coming. This might be construed into a promise on his part to bind him, but it cannot bind the sheriff. If he had said, he had received the money or that he had effects in his hands from which the

DUNCAN, vs. GADSDEN.

money could be raised to satisfy the debt, it might have bound the sheriff. But if you connect this declaration of the bailiff with former proceedings in making a levy on the goods in defendant's store on the *fi. fa.* it might be very naturally and reasonably construed into an opinion or belief that there would be enough of goods and effects to raise the money and pay off the debt, and this was previous to the sale of the goods and any knowledge of their produce, and this appears to me to be the just inference from his declaration. Upon the whole, in whatever light this case can be viewed, I am of opinion that the sheriff is not liable for this debt, and that there ought to be a new trial.

Delestieline, for the motion.

Clarke, contra.

We concur in this opinion on the ground that the sheriff was required to have the body at the return of the writ, and as the defendant died before that time, the sheriff was exonerated.

Nott, and *Gantt*, justices.



JOHN DUNCAN vs. THOMAS GADSDEN.

Defendant endorsed a note of hand, drawn by Robert Ogden, in these words, "the within amount I promise to pay, when in funds belonging to Robert Ogden, the period not to exceed six months;" construed a promise to pay, if within six months, defendant should have funds of Ogden in his hands; and the fact of his having such funds, within that period, not being averred nor proved, held that the action would not lie.

ASSUMPSIT upon a written promise; tried before the city court, May Term, 1824.

Upon the 4th February 1822, Mr. Robert Ogden gave to the plaintiff the following note: "Charleston, February 4th, 1822. Three months after date, I promise to pay to John Duncan or order, one hundred and twenty-five dollars, for value received," (signed) "Robert Ogden." Upon this note was the following endorsement; "The within amount I promise to pay Mr. John Duncan, when in funds belonging to Robert Ogden, the period not to exceed six months, February 2nd.

DUNCAN, vs. GADSDEN.

1822." (Signed) "Thomas Gadsden." Under this endorsement was this receipt: "Received ten dollars on account of the within, August 6th, 1822." (Signed) "J. Duncan."

Mr. Holmes, the defendant's counsel, was sworn as a witness, and deposed that it came within his knowledge, that at the time when the defendant entered into the above engagement, he had no other property belonging to Robert Ogden than an old desk and some notes and costs due to Mr. Ogden, which, if collected, would have been sufficient to pay the plaintiff, but that they were not collected. The defendant's council contended that the endorsement of the defendant bound him to no more than to pay the amount of the note, if he should have funds sufficient for that purpose within six months; and that as he had not funds within that time, or at any other time, he was not liable.

The recorder stated to the jury that the endorsement of the defendant was rather ambiguously expressed, but construing it as well as he could, its meaning appeared to be, that the defendant undertook to pay the amount of the note when he should be in possession of funds belonging to Mr. Ogden, and that he engaged that this should occur within six months; that is, he promised that in a period not exceeding six months, he would be in possession of these funds; when at the farthest, the note should be discharged: that if the object had been what the defendant insisted upon, the words "the period not to exceed six months" ought not to have been inserted, as a contract to pay generally, when in funds, would have been clearly entered into, had these words been omitted; when the endorsement would have been, "I promise to pay to, &c. when in funds belonging to Robert Ogden." That surplusage was not to be presumed, but that the whole of the assumption was to be supposed to have a meaning.

The jury found a verdict for the plaintiff, and a new trial was moved for, upon the ground; That the Recorder had erred in his construction of the contract.

The opinion of the court was delivered by Mr. Justice Gantt.

The defendant by an endorsement or parol agreement on

DUNCAN, vs. GADSDEN.

the back of the note, has undertaken to pay the amount expressed therein "when in funds belonging to Robert Ogden, the period not to exceed six months." It is a promise to pay the debt of another without any apparent consideration. None is stated or proved, and both were requisite to entitle the plaintiff to a recovery. If the foundation of the promise were a benefit to the defendant, or damage or loss to the plaintiff, it certainly does not appear. On the qualified nature of the promise, I should, with deference to the opinion of the Recorder, differ with respect to the interpretation to be given to it. If the understanding was that Gadsden, the defendant, was to become absolutely responsible for the payment of this money, at the expiration of the six months; why, it may be asked, were the words, "when in funds belonging to Robert Ogden," inserted; *expressio unius est exclusio alterius*. The undertaking is therefore conditional, and amounts to no more than that the defendant would pay the amount in six months, provided funds belonging to Robert Ogden should come to hand within that period. This fact ought to have been averred and proved, to entitle the plaintiff to recover. The court are unanimously of opinion that as no consideration was stated and proved, the plaintiff had no right of action. See *2d Constitutional Reports*, 339. The motion is granted.

Bay, Nott, and Richardson, Justices, concurred.

Holmes, for motion.

Dawson, contra.

CONSTITUTIONAL COURT,

COLUMBIA,
NOVEMBER TERM, 1824. }

JUSTICES PRESENT.

C. J. COLCOCK,
R. GANTT,
JOHNSON,

A. NOTT,
J. S. RICHARDSON,
D. E. HUGER.

JANE CLOUD, vs. WM. E. SLEDGE.

In an action of trover, the value of the property was alleged to be within the summary jurisdiction of the court, but the damages laid above it: verdict five dollars: held that by the express terms of the act of 1799, plaintiff in trover is entitled to full costs, when the verdict exceeds four dollars.

THIS was an action of trover, brought for property the value of which was alleged in the declaration to be within the summary jurisdiction of the court; tho' the damages were laid somewhat higher. The jury gave a verdict for five dollars, and the clerk taxed the full costs of an issue. A motion was made in the court below to re-tax the costs, which was granted, with directions to tax the costs of a summary process only. This was a motion to reverse that decision.

The opinion of the court was delivered by Mr. Justice Nott.

By an act of the provincial assembly, passed in the year 1747, (1 Brevard, 194) it is declared that "if any person or persons, who shall commence or prosecute any action in any of the courts of law in this province, shall not recover above the sum of twenty pounds, current money, (being between twelve and thirteen dollars) such person or persons shall lose all his, her, or their costs of suit.

ACOCK, vs. LINN & LANSDOWN.

By the act of 1769, (*P. L. 270*) the judges were authorized to hear and determine in a summary way, without a jury, all causes "for any sum not exceeding twenty pounds sterling:" And by the fee bill established in 1791, an attorney is allowed twenty shillings "for commencing and prosecuting or defending a suit by summary process." Under these several acts, it has been held that where a person brings an action arising *ex contractu*, and it shall appear on the trial that the plaintiff's demand did not exceed the sum of twenty pounds sterling, he shall be entitled to the costs of a summary process only.

But by the act of 1799, 1 *Brevard*, 194, it is enacted that hereafter in all actions of trespass to try titles to land, "in all actions of trespass on the case, in all actions of trover, and in all actions of detinue, or any of them, brought to establish or to try the right of title in any kind of property," if the plaintiff establishes his right of property therein, he shall in every such case recover and have his full costs of suit, whenever the verdict shall be above four dollars.

The words of the act are so strong that they can not be resisted. If they had been made for this very case, they need not have been more explicit. It does indeed appear oppressive that in an action involving the right of property to the amount of five dollars only, the party should necessarily be subjected to twenty dollars costs, and most frequently to three times that amount. It would be very desirable that the legislature should remedy the evil; but, the court can give no relief.

The motion must be granted.—*Richardson, Johnson, and Huger*, Justices, concurred.

Mills, for motion.

Johnson, contra.

EDWARD ACOCK, vs. LINN & LANSDOWN.

Defendant in attachment cannot appear by attorney at the return of the writ, and defend the action, without entering special bail.

In this case the plaintiff had issued an attachment against the property of the defendants, who were without the limits of the

ACOCK, vs. LINN & LANSDOWN.

state. At the return of the writ, the defendants caused a common appearance to be entered by an attorney. The plaintiff nevertheless went on to file his declaration and to obtain an order for judgment, in the same manner as if no appearance had been entered. The defendants then came in by their attorney and moved to set aside the order for judgment, and for leave to plead to the action. The court refused to let the party in upon any other terms than entering special bail to the action and dissolving the attachment.

This was an appeal from that decision and the motion was now renewed, for leave to plead without entering special bail to the action, and the ground relied on was that it is unnecessary for the party, defendant in attachment, to enter special bail, in order to entitle him to defend the action; that this is only requisite when he wishes to regain possession of the property attached.

The opinion of the court was delivered by Mr. Justice Nott.

It would be sufficient in this case to say that the decision in the court below was in conformity with the long established usage and practice of our courts. It appeared to me to be a well settled principle, when I first came to the bar, and it is but lately that I have ever understood that there exists any difference of opinion on the subject. It is a misfortune that the early decisions of our courts have not been reported. It subjects us to the inconvenience of having the same question contested over and over again, upon every new accession to the bench or bar. But although we have no reported cases of our own on the subject, we are not without authority, so far as the decisions of the courts of our sister states may be considered authority. In the case of *Campbell & Morris*, 3d *Harris & McHenry's Reports*, Judge Chase, who delivered the opinion of the court, says "an attachment is to compel the appearance of the defendant. When the defendant comes in on the return of the attachment, he is in the same relation that he would have been if taken on a *capias ad respondendum*, and cannot appear without bail." It is also in analogy with all legal proceedings. The process can not be at the same time against the goods and the person of the defendant.

SIMSON, *ads.* KENNEDY.

The defendant is not in court, so long as the attachment remains on the goods. It is only by dissolving the attachment and substituting his person in the place of the goods, that he becomes a party; and that can only be done, according to the terms of the act, by entering special bail to the action.

The object of the act was to give the creditor a remedy against an absconding debtor. It requires the debtor therefore, before he can be permitted to make defence, to place himself in the same situation in which he might have been placed by the plaintiff, if he had not absconded. The plaintiff might have arrested him and held him to bail; and the law does not intend to aid him in placing himself beyond the reach of his creditor by running away. It allows both parties precisely the same privileges and subjects them to the same liability as if the defendant had not absconded. He can not expect to be placed in a better situation than an honest debtor who has not fled from his creditor.

The motion is therefore refused. *Richardson, Johnson, Huger*, Justices, concurred.

Rogers, for motion,
Williams, contra,

RHODAM SIMSON, *ads.* JAMES KENNEDY.

The land in dispute had been sold to defendant by the Sheriff, under a judgment and execution against one Phillips, in 1813: Plaintiff relied on a recovery against Phillips, of the same land in 1815: Held that the record of recovery was not conclusive against defendant, who might shew title in himself, and that the recovery was fraudulent.

THE location and trespass were admitted. The plaintiff exhibited his claim of title from Dorch, the grantee, to Kirkland, from him to Patton, and from him to the plaintiff.

The defendant then exhibited his claim of title from the same grantee down to Phillips, and from the sheriff, (who sold in 1813, under a judgment of 15th December, 1812, and

SIMSON, *ads.* KENNEDY.

execution against Phillips) to Aaron Smith, the lessor of defendant.

The plaintiff, at this stage, offered in evidence the record of a recovery against Phillips, in 1815, of the land claimed by defendant, to which the defendant objected, but the court overruled the objection and decided that the said recovery was conclusive, and rejected evidence offered by defendant to prove his title, as well as fraud on the part of Phillips, in suffering the recovery.

The jury, under the direction of the court, found a verdict for the plaintiff.

The defendant moved for a new trial on the following grounds:

1st. Because the said record of recovery was incompetent testimony. 2nd. Because the said recovery was not conclusive evidence. 3rd. Because the evidence offered by defendant, to prove the fraud of Phillips and the defendant's title, ought to have been allowed.

The opinion of the court was delivered by Mr. Justice Nott.

It is a general rule of law that a record can be given in evidence only between the parties or privies to a suit. The present defendant was no party to the record offered in evidence, and he stands in no such relation to Phillips, as to be bound by a recovery against him. The land was transferred to the defendant by an act of the law, and not by an act of Phillips. The plaintiff stood by and saw it advertised, day after day, as the property of Phillips; he permitted it to be sold as such, at public auction, without interposing his claim or giving any notice that he had any.

I think therefore, that the defendant ought to have been permitted to go into his title, and to impeach the title of the plaintiff on the ground of fraud.

The motion therefore, must be granted.

Huger, Johnson, and Gantt, Justices concurred.

Gregg and Hunter, for motion.

, contra.

CHARLES FOWLER, vs. ROBERT WORD.

Defendant and one A. signed a note of hand for \$ 100, payable at four months, which A. passed to plaintiff, for a loan of \$ 50; with a verbal stipulation that if the \$ 50 were re-paid within the four months, the note should be given up. The declaration contained a count on the note and one for money lent. Verdict for plaintiff, \$ 50 and interest. New trial granted; the court holding that if the note was not usurious, the plaintiff must recover the \$ 100 as a penalty; there was no preence of a loan to defendant.

THIS was an action of assumpsit. The declaration contained two counts; one on a promissory note for one hundred dollars; the other for fifty dollars lent to the defendant. It appeared in evidence that B. H. Allen procured the defendant to join him in a note for one hundred dollars, for the purpose of raising money upon it. It was made payable to , four months after date. The plaintiff, Charles Fowler, lent Allen fifty dollars, and his name was inserted in the note as payee. At the same time a verbal stipulation was entered into, that if Allen would re-pay the fifty dollars at the expiration of the four months, the note should be given up, otherwise it should be forfeited to the payee. The presiding judge instructed the jury that if they should be of opinion that it was a bona fide loan of fifty dollars, intended to be secured by the hundred dollar note, without any intention to exact any thing more than lawful interest, the additional fifty dollars might be considered as a penalty and would not vitiate the agreement. In that view of the subject, they might find a verdict for the fifty dollars with interest. If however, they should be of opinion that it was a mere disguise, to cover the corrupt agreement, the contract was void and they must find for the defendant.

The jury found a verdict for the plaintiff, for fifty dollars, with interest thereon.

This was a motion for a new trial, on the ground that the verdict was contrary to law and evidence.

The opinion of the court was delivered by Mr. Justice Nott.

Usury is defined to be "the taking or contracting for exorbitant interest, for the forbearance of the principal." Exact-ing unlawful interest, under whatever veil it may be disguised,

FOWLER, vs. WORD.

if the intention can be discovered, will vitiate the most solemn contract. The bona fide loan of money, the re-payment of which at a future day is secured by a penalty, is not usury. But in such case the penalty itself is recovered, and the party can have relief only in equity, except in the case of a common money bond, where he is relievable in a court of law by statute. Two of my brethern are clearly of opinion that the note in question is usurious, and I am much disposed to concur with them in opinion. There is no condition on the face of the note; it is an unconditional promise to pay one hundred dollars at the expiration of four months, for the loan of fifty dollars, which would amount to an hundred per cent. upon the sum borrowed, and fourteen per cent. interest upon it after that period. If therefore the jury had found a verdict for the defendant, I should have been very well satisfied with it; but as they have found for the plaintiff, I will express no opinion upon that question. I am nevertheless of opinion the verdict is erroneous and ought to be set aside. If they intended to find a verdict on the first count in the declaration, they should have found for the full amount of the note. If they meant to bottom their verdict on the second count, then it is wrong because this defendant was no party to the contract. The money was lent to Allen and not to Word; he merely subscribed his name to the note and sent it out to find a market where it could. He knew nothing of the verbal contract. The motion therefore must be granted.

P. Farrow, for motion.

O'Neal, and *Irby*, contra

PENELOPE SIMS *par pro. ami* vs. JOHN SAUNDERS.

Plaintiff having given inconclusive testimony of a parol gift and delivery of a slave, introduced the subsequent declarations of the donor, to establish that he had given; held that on the part of defendant, the subsequent acts and declarations of the donor were properly received in evidence, to shew that he had not given.

THE plaintiff claimed a slave, who was the subject of the suit, by a parol gift from her grandfather. Testimony of a somewhat inconclusive character, was offered to establish the gift and delivery of the slave, and declarations of the grandfather, made after the alleged gift, admitting the fact of his having given, were also introduced.

The defendant claimed the slave under a deed from his father (who was the grandfather of plaintiff) of a date subsequent to the alleged gift to plaintiff. On his part, evidence was admitted of declarations of the donor, made after the supposed parol gift, to shew that he had not given. The record of an action brought by the present plaintiff against the donor in his life time and which had abated by his death, to which he had pleaded "*not guilty*", was also admitted. Verdict for defendant.

A new trial was moved for on the ground that the declarations of the donor, made subsequently to the gift to plaintiff, and the record of the action to which the donor had pleaded not guilty, were improperly admitted in evidence on the part of defendant.

The opinion of the Court was delivered by Mr. Justice Nott.

As a general rule of law, a person who has made a gift or done any other act, cannot be permitted to impeach it by his after declarations.—If therefore the gift in this case had been proved, the declarations of the donor ought to have been rejected: but the proof was imperfect and inconclusive. If the plaintiff had relied alone on the evidence of the gift and delivery, without resorting to subsequent declarations on her part, the defendant could not have been permitted to give such evidence. But as the plaintiff was obliged to resort to the conduct and

WILLBOURN, vs. PARHAM.

conversation of the donor to ascertain his intention, that testimony, like every other, ought to be given entire. The motion therefore must be refused.

Richardson, Huger, and Johnson, Justices concurred.

A. W. Thompson, for motion.

Williams, & ——— contra.

W. R. WILLBOURN, vs. JOHN PARHAM.

Plaintiff and Defendant claimed the same slaves, under different bills of sale from one W. B. Held that W. B. was a competent witness to prove that plaintiff's bill of sale had been obtained by fraud.

THIS was an action of trover for two slaves. It was admitted that the slaves at one time belonged to Washington Blassingame. John Nance, the first witness called, proved a bill of sale to which he was a subscribing witness, from Washington Blassingame to the plaintiff, dated the 8th of August, 1820. He said the consideration of the bill of sale was a debt which Blassingame owed Willbourn and himself, as partners in trade, of about \$130; as well as other debts which Willbourn paid for him: That Blassingame had frequently applied to him and Willbourn to purchase these negroes, and he believed it was a fair, bona fide transaction: He had heard Blassingame several times afterwards say he was satisfied with the sale. *Flemming B. Nance* was also a subscribing witness to the bill of sale. He saw no money paid, but he heard Blassingame afterwards acknowledge that he had received the principal part of the consideration money.

The bill of sale was for four negroes, and for several articles of household furniture; indeed, it appeared to contain all the property that Blassingame owned. The negroes were not present at the execution of the bill of sale.

Daniel Mitchel, said he was the sheriff of Union District at the time. He had levied executions on the negroes, to the amount of six hundred dollars and had the negroes in his posses-

WILLBOURN, vs. PARHAM.

sion. They were advertised for sale on the first Monday in August 1820, which was the 7th of the month. On the morning of that day, Washington Blassingame and Willbourn, the plaintiff in this action, came to him. They informed him that Mrs Blassingame, the mother of Washington, wished him to purchase her land; pay off these executions, and let her have the negroes. He told them that he would postpone the sale until the next day: in the mean time, he would inquire into the title, and if he found it to be good, he would accede to that arrangement; provided Mrs. Blassingame would come forward the next morning and make him titles. Upon enquiry he became satisfied with her title. The next morning, which was Tuesday, Mrs. Blassingame, her son and Willbourn all came together to him. He told them he was ready to accept the proposal which had been made to him the day before. Titles were then drawn and executed by Mrs. Blassingame: She then directed him to deliver the negroes to Willbourn and he did so. The two negroes he thought were worth about \$500.

Here the testimony for the plaintiff closed.

A *Mr. Stokes*, was called for the defendant. He said that a few day before the negroes were to be sold, a contract took place between Washington Blassingame and his mother, the purport of which was that she might have the negroes, provided she would sell her land and pay off the debts for which they were under execution. That on Tuesday morning, he came to the court house (where the negroes were to be sold) in company with Mrs. Blassingame, Washington and Willbourn. He did not know that Willbourn was then acquainted with the contract made between Washington and his mother; he mentioned it to him as they were riding together and told him that they were then going to the court house, for the purpose of carrying it into execution. Willbourn said he wished to get a bill of sale of them himself, to recover a debt which Blassingame owed him. When the sheriff delivered the negroes to Willbourn, he brought them and then delivered to Mrs. Blassingame. She took one of them on her horse behind her and got a friend to take the other and carried them home.

WILLBOURN, vs. PARHAM.

Isaac Harlan testified that early in August 1820, on a Thursday evening, he did not recollect what day of the month, Washington Blassingame and Willbourn came to his house and said they were going to Parham's (the defendant's) to try and steal away those negroes and wanted him to go with them, but he declined going.

Francis Parham proved a bill of sale from Mrs. Blassingame to defendant for the negroes, dated 16th August, 1820. He saw only five dollars paid; Mrs. Blassingame said that was the last payment.

James Smith said he had drawn a bill of sale for these negroes from Washington Blassingame to his mother. The Wednesday after the first Monday in August, 1820, he fell in with Willbourn going to his (Willbourn's) store. He desired Smith not to go by the store, for Mrs. Blassingame and Washington were there; Washington was about to execute a bill of sale to his mother for these negroes, and he did not wish Smith to go there as they would wish him to be a witness to it. Willbourn however, told him that he had made himself safe, and that he would persuade Washington to make a bill of sale to his mother to make her easy. The bill of sale was here produced, purporting to have been executed on the 29th of August, 1820, it was signed "*Washington Blassingame, if he can,*" thereby seeming to imply a doubt whether he had a right to execute such a deed. Mr. Smith said that on the 25th of the same month, he saw the bill of sale; it was then executed, although it purported to have been done on the 29th. It appeared that Mrs. Blassingame could neither read nor write and might therefore be easily imposed upon in the date of the instrument.

Washington Blassingame, was here introduced.

The object of his testimony was to impeach the bill of sale to Willbourn, as fraudulent; having been given to protect his property against his creditors.

Two objections were made to his competency; 1st. That he was incompetent to impeach or invalidate his own act; 2nd. That parol evidence could not be given to contradict a deed. The objections were overruled and the witness was sworn. He

372 SOUTH-CAROLINA STATE REPORTS,

WILLBOURN, vs. PARHAM.

said he had been imprudent and profligate, and had become much involved and was in danger of spending all his property. He said that Willbourn had pursued him day and night, to persuade him to give a bill of sale of his property, for the purpose of keeping it from his creditors. He had at length yielded, and that was the sole object of the bill of sale. Willbourn protested most solemnly and pledged his honor as a Mason (they both belonging to the order) that he would never take advantage of him. Willbourn had never paid a cent for them. It was true he owed Willbourn something, he did not know how much; he never had a settlement with him, and if his account had been credited in Willbourn's books, it was without his knowledge or consent. Willbourn had paid some debts for him, but they were paid out of his own funds. He said Willbourn was present when the contract was made between himself and his mother, and that it was in pursuance of that contract that the negroes were delivered to her. When he was about to execute the bill of sale to his mother, Willbourn desired him to do it in such a way as to render it ineffectual, and it was for that purpose he added the words "if he can."

Several very respectable gentlemen were called to the character of Blassingame. They said he had been imprudent and profligate, but they thought him a young man of a very high sense of honor, and that they would believe him on his oath as soon as any man whatever.

Mr. Nanco was called again in reply.

He proved the payment of several debts by Willbourn for Blassingame. He said the credit given on their books to Blassingame was done in his presence and with his consent. He said the bill of sale to Willbourn and the one to Mrs. Blassingame were both executed on the same day;—Willbourn's in the morning and Mrs. Blassingame's in the evening of Tuesday, the 8th of August. He afterwards said he might be mistaken with regard to Mrs. Blassingame's; it might perhaps have been the next day that it was executed, but he was very confident that Willbourn's was done on the morning of the 8th, at his store. Blassingame was here called back. He said he

WILLBOURN, vs. PARHAM.

was sure Willbourn's bill of sale was not executed until after the 8th, for he recollected distinctly that he stayed on Monday night at a Mrs. Woodson's, and went the next morning to his mother's; that Willbourn met him there, and they all went together to the court house, and that he was not at Willbourn's store that day.

Verdict for defendant. Motion for a new trial, on the grounds that Washington Blassingame was an incompetent witness, and that the verdict of the jury was against law and evidence.

The opinion of the court was delivered by Mr. Justice Nott.

There are but two legal questions submitted in this case: First, whether Washington Blassingame was a competent witness: Secondly, whether being competent, his testimony ought to be received to contradict a deed.

His competency is resisted on the ground that no person shall be permitted to invalidate an instrument which he has himself signed. The only case in which I have known such a principle to be laid down, is the case of *Walton and Shelly*, 1 D. & E. 300. But in the case of *Bent. & Baker*, 3d D. & E. 27. all the judges of the King's Bench declared that the rule must be confined to negotiable instruments. It has since been exploded altogether in England. But it is not necessary to bring up the question now, for this is a deed, in relation to which it is universally admitted that the rule does not apply.

The second question is equally well settled. Parol evidence ought not to be admitted to contradict a deed, unless it be to impeach it for fraud. But fraud will contaminate the most solemn instrument; and there are but few cases where fraud can be reached but through the medium of oral testimony. The testimony of a witness who comes to impeach his own deed on the ground of fraud, is always to be received with caution. But the Jurors are the judges of credibility. This case did not depend on the testimony of Blassingame alone. The principal facts were strongly corroborated by other witnesses: and if their testimony was entitled to belief, a greater tissue of fraud was never developed in a court of justice. The

WILLROURN, vs. PARHAM.

court are of opinion that the motion cannot prevail on the legal grounds.

With regard to the facts, I would only observe that the plaintiff's counsel seem to take it for granted that the sale to Willbourn was anterior to that to Mrs. Blassingame: But it will be recollected that the contract between Mrs. Blassingame and her son was entered into before the seventh of the month, and that it was actually carried into execution and the negroes delivered on the morning of the eighth: That Willbourn was then present, assisting in the negotiation, and actually delivered the negroes to her. Although his bill of sale bears date the eighth of the month, Washington Blassingame swears it was not executed until after that day: And Stokes swears that Willbourn told him on that day, that he wished to get a bill of sale of them, but not that he had one. But even if he had one then in his pocket, it was attended with such circumstances as entitled it to no regard. The testimony, therefore, well authorised the verdict which the jury have found; and the motion must be refused.

Johnson, Huger and Richardson, Justices. concurred.
A. W. Thompson, for motion. Williams, contra.

WILLIAM M'KENNA, vs. THE COMMISSIONERS OF THE ROADS
OF LANCASTER DISTRICT.

In 1801, W. B. and J. S. the owners of the land on which the present village of Lancaster is situated, petitioned the legislature that a village might be laid out and established; by a resolution of the legislature, this was ordered to be done and a plat of the village to be returned: By an act of 1820, the commissioners of roads were directed to open the streets of the village, according to the original plan; which they proceeded to execute: Plaintiff, who had been in possession of the land over which the streets were attempted to be opened, and who derived his title from W. B. and J. S. declared in prohibition against the commissioners, who pleaded the act of 1820 and that they acted in conformity thereto: Plaintiff replied that there was no original plan of the village: upon proof of the existence of such plan and verdict of a jury to that effect, prohibition dismissed.

The act of 1820 was no violation of the constitutional right of plaintiff.

THE declaration in prohibition stated that the plaintiff was seised and possessed of a certain freehold, near the village of Lancaster, and that the commissioners of the roads, without tendering him compensation, were proceeding to lay out many streets which the public good did not require, in violation of his constitutional and legal rights.

The commissioners justified under an act of the legislature passed in 1820,—authorizing them to lay out, or rather to open certain streets in the village of Lancaster, according to the original plan of said village, recorded in the office of the secretary of state.—The plaintiff replied, that there was no original plan of the village of Lancaster, by which his lands were liable to the intrusion and trespass of the commissioners, &c. Upon which issue was joined.

The plaintiff then exhibited his title; a deed from William Barkley for 22 acres, 7th Oct. 1808; bounded south & west, by White street; 2 a deed from John Simpson,—Nov. 1815, for land lying in and adjoining the village of Lancaster, calling for several of the streets of the village;—3—a deed from Abm. Perry 2, Sept. 1809, near the village of Lancaster; 4, a grant, 20 May, 1809, for

M'KENNA, vs. COMMISSIONERS

It appeared that in the year 1801, a petition was presented to the Legislature by John Simpson and William Barkley, the owners of the land, praying that a village might be laid out at Lancaster court house. In consequence of which, a resolution was passed authorizing certain commissioners to lay out and make a plat of a village and return the same at the next setting of the legislature. A certificate of the secretary of state was here produced, stating that he had examined the records of his office, and that he could find no plat of the village filed there: That among the miscellaneous records, he found the record of a plat which had been received as a plat of the said village, by a resolution of the legislature in 1808, and ordered to be recorded. This purported to be the copy of a plat made out in 1802, and signed by the commissioners appointed by the resolution of 1801. When it was returned to the Legislature did not appear.

Mr. *Samuel Dunlap* was called. This witness was a very old man:—He said that during the time the county court was held at Lancaster, a village was laid out there. He did not know by what authority. John Simpson, William Simpson, William Barkley, Eli Alexander, and himself were the commissioners. He afterwards understood that another plat was made out; whether according to the former he did not know. Some of the streets in the first plat were named differently from the latter.

Mr. *Ingram*, saw a plat of the village seven or eight years ago. Mr. *Belk* saw one eight or nine years ago; does not know what became of it, except by hearsay; was once present when Purdy applied to M'Kenna, the plaintiff, for the plat; he refused to let him have it. Mr. Bar was present when the public land was first laid out for the county court. The main street was then run out

It ought here to be remarked that it did not appear that any of the streets were ever actually run out during the time of the county courts, except the Main-street, and perhaps one cross street; nor were there any buildings except on those streets.

M'KENNA, vs. COMMISSIONERS.

Mr. Crocket saw a plat of the village about twelve years ago.

Mr. Perry built a house in Lancaster about twenty years ago, on Gay-street; the lot was 99 feet front and 164 feet deep.

Thomas Lee received the original plat of the village from John Simpson, about 14 or 15 years ago. The writing attached to it was in the hand of Mr. Eli Alexander; does not recollect who else had signed it. A deed was here produced, dated 1813, referring to the plat of the village.

Mr. M'Daniel was employed by Mr. Purdy (who is since dead) to lay off a piece of ground for him. He wanted the plat of the town for that purpose, Purdy told him he once had it and had let M'Kenna have it. He went with Purdy to M'Kenna to get it: Purdy demanded it of him, but did not get it; some warm words passed between them on the occasion. He heard M'Kenna afterwards regret what had happened; he acknowledged that he had it, but said that it was mislaid and he could not then find it.

Col. Montgomery once saw a plat of the town in the hands of Mr. Purdy; whether the original or not, he did not know: It appeared to be a very old paper and much broken.

Mr. John Richardson had seen the plat of the village a great many years ago. A deed was here introduced, dated in 1802, referring to a street called Jefferson. No such street appeared in the plat recorded in the secretary's office. A deed of John Simpson was introduced, calling the village ~~Barnes~~ ville or Lancaster.

A great many witnesses were introduced to give ~~their~~ opinions with regard to the necessity of opening the ~~streets~~. Most of the persons living in the village were of opinion that there was a necessity for opening some of the streets, and that opening the others was a convenience to the village. Other persons experienced no inconvenience from the streets being enclosed. Upon this evidence the jury found the following verdict: "We find the plan shewn to be a copy of the original ordered to be made by the legislature." That fact being found, the court dismissed the prohibition. This was a motion for a new trial on the several grounds stated in the opinion.

M'KENNA, vs. COMMISSIONERS.

The opinion of the court was delivered by Mr. Justice Nott.

The first ground taken for a new trial in this case is: Because there was no legal proof of the original plan of the town. The proof was the testimony of several respectable witnesses, that they had for a great many years past seen a map, purporting to be the plan of the village of Lancaster; that it had often been referred to as such, by persons wishing to have a survey of lots; that it had been traced into the hands of the plaintiff in this case, since which it had never been seen; he could have produced it, if it were not the true plan of the village. In addition to this, were the resolution of the legislature of 1801, directing such a village to be laid out; the resolution of 1808, recognizing it and directing it to be recorded, and the certificate of the secretary of state, that such a plan had been recorded, pursuant to the resolution of the legislature. The court is satisfied that the testimony was sufficient to authorise a verdict establishing that fact.

The second ground is: Because there was proof that there was another original plan, antecedent to the one established by the verdict.

The third ground is: Because the act not referring to any precise plan, is void for uncertainty.

These two grounds may be considered together. The only evidence of the existence of the first plan contended for, was that the owners of the land had, without any particular authority, caused two streets to be laid out at right angles with each other; that they had given them names and had also named the village. But it did not appear that any other streets had ever been laid out, or that any plan of the village had ever been delineated upon paper. It is not now necessary to go into the inquiry, whether an individual can lay out a village on his own land and dedicate certain portions of it to public use as streets; for the same individuals afterwards applied to the legislature to lay out a village under their authority, which was accordingly done. And there can be no doubt after the legislature had required a village to be laid out, and had directed the plan to be recorded, but that the act of 1820,

MILLER, vs. STEEN.

directing the streets to be opened according to the original plan, must be construed to have relation to the plan thus directed to be made out and recorded.

The fourth ground is: Because the jury should have found either that the streets were public property at the time of the passage of the act of 1820, or that the freehold was in M'Kenna until that time.

The only question which was or which could have been submitted to the jury was, whether a plan of the town had ever been made out in pursuance of the resolution of the legislature. The conclusion to be drawn from the establishment of that fact was a question of law, which belonged exclusively to the court to determine, and ought not to have been submitted to the jury.

The two last grounds submit to the consideration of the court, the constitutionality of the act of 1820, which directs the streets to be opened.

The right to declare an act of the Legislature void which conflicts with the constitution, has been frequently recognised by the court; such a power results from the organization of our government. The constitution is the supreme law of the land. It is the law which the judges are sworn to support in preference to all others. But to declare an act of the legislature to be void, is an exercise of the highest authority that can belong to a judicial tribunal. It ought not therefore to be exercised, except where the necessity is clear and manifest. But the court do not discover in this case any such violation of the constitutional rights of the plaintiff.

The village was laid out in the year 1802, with the consent of the owners of the land. The plaintiff became a purchaser from those persons several years afterwards. The deeds under which he claims, calls for the village of Lancaster; they call for certain streets in that village, the names of which are not to be found any where, except in the map now established. These streets had then, by a resolution of the legislature and the consent of the owners of the land, been dedicated to the use of the public, of which he must have had notice when he pur-

MILLER, vs. STEEN.

chased. He purchased therefore subject to this claim of the public. The question does not arise, whether private property can be taken for public purposes without making compensation. The act only appropriates to the use for which it was originally intended, property already dedicated to public purposes, and over which the plaintiff was exercising an unreserved authority. The court below therefore was correct in dismissing the prohibition. With regard to the expediency of the measure, that was a question for the consideration of the legislature. It is a subject over which they still have the same controul and may suffer them again to be enclosed, if the public good does not require them to be kept open. The motion must be refused.

Johnson, Huger, and Richardson, Justices, concurred.

Clendinen, and Hill, for motion.

S. D. Miller, contra.



ARMSTEAD MILLER, vs. GIDEON STEEN.

Plaintiff in sum. pro. stated his demand to be on a note of hand for \$35, which was lost; a copy of such note was annexed to the process. On trial, he proved that a payment of \$5 had been made on the note for \$35, which was taken up and a new note for \$30 given: Non-suit ordered, and motion to set it aside and amend, refused.

This was a sum. pro. in which the plaintiff set out his cause of action in the following words:

"That Gideon Steen, is indebted to your petitioner in the sum of thirty-five dollars and interest, by a note of hand which is now lost or mislaid, a copy of which is herewith exhibited."

On the back of the process is written; "COPY NOTE—Four days after date, I promise to pay Armstead Miller or order thirty five dollars, for value received, 18th Feb. 1816."

(Signed)

his
"GIDEON X STEEN,"
mark

MILLER, vs. STEEN.

The plaintiff's own witnesses proved that five dollars had been paid and the original note taken up, and a note for thirty dollars given in its stead. The presiding judge held that the testimony did not support the allegation in the process and ordered a non-suit. Some days after the non-suit was ordered, a motion was made to amend the process, so as to correspond with the proof which had been offered. The presiding judge refused the motion.

This was a motion to set aside the non-suit on two grounds: 1st. Because the evidence was sufficient to support the case, as the note was lost: 2d. Because if it was not, the plaintiff ought to have leave to amend.

The opinion of the Court was delivered by Mr. Justice Nott.

In this summary mode of proceeding by way of petition, the manner of setting out the plaintiff's cause of action is of but little importance, so that it is done with sufficient precision to be a bar to another action brought for the same cause. If therefore the plaintiff had stated about the amount which he supposed to be due, after having stated that the note, was lost, without attempting to give a copy of the note the evidence offered might have been received. But by the profert of the note, he had undertaken to prove it as laid; and a recovery in this case would have been no bar to an action on the true note. The testimony was therefore properly rejected. Leave to amend is so much a matter of discretion, that this court will seldom undertake to control the circuit judge in that respect. A non-suit had been ordered in this case, and the cause was actually out of court. To have suffered the party to amend, would have to allow him to substitute a new and distinct cause of action. This court is not disposed to interfere with the opinion of the court below. The motion is refused.

Richardson, Huger, and Johnson, Justices, concurred.

Herndon, for motion. A. W. Thompson, contra.

JAMES VINCENT, vs. ABM. PERRY.

Trover. Defendant, a sheriff, levied on two slaves, under executions. After the levy, the owner sold them to Plaintiff, subject to the sheriff's lien. Plaintiff offered to pay the amount of the executions, but made no tender. Defendant refused to deliver up the slaves, and afterwards sold them. Held that the action would not lie.

THIS was an action of trover, for two slaves. It appeared in evidence that the defendant, as sheriff of Lancaster district, had levied two executions on the negroes in question. While they were thus under executions, the owner sold them to plaintiff in this action, subject to the lien which the sheriff had on them.

Previous to the day of sale, the plaintiff offered to pay the money due on the executions, provided the sheriff would deliver up the negroes to him. The sheriff said he would receive the money, but would not deliver up the negroes: He had some other lien on them, but what it was, did not appear to the court. They were afterwards sold under the executions. There was no actual tender of the money to the sheriff nor was it brought into court. When the testimony was closed, it was submitted to the court whether the plaintiff had supported his action.

The presiding judge, being of opinion that the evidence was not sufficient to maintain the action, ordered a non-suit. This was a motion to set aside that non-suit.

The opinion of the court was delivered by Mr. Justice Nott.

The sheriff had a right to the negroes until the money was actually paid,—and until then, the plaintiff had no right to demand them. The sheriff was under no obligation to make any terms with him. If the money had been tendered, it would not have placed him in a better situation; for nothing but actual payment would have released them from the lien by which they were held. The motion therefore must be refused.

Johnson, Richardson, Gantt and Huger, justices, concurred. Clendenin and Hill, for motion.

S. D. Miller, contra.

BRUTON, admr. vs. N. R. CANNON, fi. fa.; HOWELL vs. SAME, fi. fa.; CURRY, admr. vs. SAME, fi. fa.; ALLEN, vs. SAME, fi. fa.

On a rule against the sheriff to shew cause why he had not made the monies on certain executions, he returned that before the lodging of the executions, defendant had mortgaged certain slaves to one R. but that the mortgage was not recorded; that the slaves had been sold by him (the sheriff) and that the money was in his hands, to be paid to the satisfaction of the mortgage or the executions, as the court might direct: Rule discharged and parties left to contest their rights at law.

THIS was a rule against Edmond Pooser, esq. sheriff of Orangeburgh district, to shew cause why he had not made the money, under the executions in the above cases.

The sheriff shewed for cause that certain negroes, once the property of the defendant Cannon, had been mortgaged by him to Joseph Robinson, on his becoming security for Cannon to one Williamson, at a period antecedent to the lodging of the executions in the above cases. That the mortgage had not been recorded, but that the negroes had been sold by him and the amount of sale was in his hands, to be paid over either to the satisfaction of the mortgage or to the executions, as might be decided by the court.

The presiding judge ruled that the mortgagee was entitled to the money, but recommended that the question should be brought up to the constitutional court.

The opinion of the Court was delivered by Mr. Justice Gantt.

The rule should have been discharged and the parties left to contest their rights at law, which is accordingly ordered by this court.

Colcock, Richardson, Huger, and Johnson, Justices, concurred.

Gantt, and Trotti, for motion.

—, contra.

MUSE TOLLISON, et. al. ads. GEORGE MILLER, Assignee.

Bond for the Prison bounds is assignable under the act.

ACTION of debt, by the Plaintiff, as assignee of Thomas Pool, sheriff, against Muse Tollison and his securities, on a

300 SOUTH-CAROLINA STATE REPORTS,

WITHERSPOON, vs. DUNLAP.

prison bounds bond. After craving oyer of the condition of the bond, the defendant demurred generally. The demurrer was overruled. On motion to reverse the decision.

The opinion of the court was delivered by Mr. Justice Gantt.

The only question in this case was, whether a prison bounds bond, given by a defendant in execution, is assignable under the act; so as to enable the assignee to maintain an action in his own name thereon. The words of the act are express on the subject, that such shall be the course of proceedings: See prison bounds act, 7th clause, P. L. 457; also 1 McCord, 373; 2 McCord, 137, 267; and State Reports, 105. The motion to reverse decision below must fail.

Colcock, Huger, and Richardson, justices, concurred.

Irby & Goodman, for motion.

Thompson, contra.



JAMES H. WITHERSPOON *et al.* vs. SAMUEL F. DUNLAP.

There must be a joint seizin in the parties Plaintiff and Defendant, to sustain a suit for partition.

This was a proceeding in partition. The defendant, being in possession of the land intended to be divided, was served with a summons to shew cause why a writ of partition should not issue. He appeared and pleaded that he was not jointly and legally seized with the applicants. To this plea there was a general demurrer; which was sustained by the presiding judge. From this decision the defendant appealed, on the ground that in partition there must be joint seizin to give jurisdiction.

The opinion of the court was delivered by Mr. Justice Gantt.

The question in this case respects the sufficiency and legality of the plea, which was put in by the defendant.

If the plea be good in law, the plaintiffs should have replied thereto; if bad, the demurrer has been properly sustained.

There can be no question but that the declaration in partition should allege and set forth that the defendant and the

DUPREE, vs. HARRINGTON.

plaintiffs hold together and undivided the tenements respecting which partition is sought to be made; and that the portion which each is entitled to, should be distinctly set forth. The defendant may either confess the action and consent that partition may be made, or he may plead in bar. If he does not hold together with the plaintiffs, a right or title, such as has been set forth in the declaration, then he may plead in bar; and the only correct plea in bar is "non tenent insimul;" for it is said that every other plea in bar is tantamount to this. 2 Sellon, 218; upon this plea issue may be taken and the parties proceed to trial, as in other cases. "Ibid."

It follows very clearly, that as "non tenent insimul" is a good plea in bar in an action for partition, and as defendant had pleaded this plea, the plaintiffs should have taken issue on the plea and not demurred thereto. The decision of the presiding judge in supporting the demurrer, is overruled.

GRIFFIN DUPREE vs. JEPHTHA HARRINGTON.

Plaintiff agreed to sell and delivered a horse, with a stipulation that the right of property should not pass to the vendee, until half the consideration should be paid; held that until such payment made, the horse remained plaintiff's.

THE plaintiff entered into a contract with one Josiah Haney. The note taken, expresses the terms of the contract and is in the following words; "I promise to pay Griffin Dupree or order, fifty five dollars, in good merchantable whiskey, at fifty cents per gallon, for one bay mare; which said mare to be mine till I am paid one half the whiskey; to be paid by the last of May next; the other the first day of December, it being for value received of him, this 3d of April, 1821." signed "JOSEPH HANEY," Test "John Kendrick." Kendrick, the witness to the note, subsequently purchased the mare of Haney, and by his agreement, was to comply with the terms of said contract entered into by Haney to Dupree. Kendrick died without having fulfilled his contract. Dupree possessed himself of the mare, and the present defendant (Harrington,) who became the administrator of

DUPREE, vs. HARRINGTON.

Kendrich, took the mare, as belonging to the Estate of Kendrick: on which Dupree commenced his action against him for the taking. Whether the absolute right of property passed from Dupree to Haney, by the contract entered into between them, or whether this right remained in Dupree until the terms thereof were complied with, was the question.

The presiding Judge was of opinion that Dupree having parted with the possession, had no right to repossess himself of the mare; the right of property having passed from him by his contract with Haney; and decreed in favor of the defendant. The appeal was to obtain a reversal of that decision.

The opinion of the Court was delivered by Mr. Justice Gantt.

Possession of a chattel is in law *prima facie* evidence that it is accompanied with the right of property; but presumption may be rebutted by higher and better evidence. I hold it to be a correct and well established principle that the owner of a chattel may make a qualified contract respecting it, and in parting with the possession, still retain his right of property therein.

It holds good in all cases of bailment where the possessor has only a qualified right, the absolute right of property being in the bailor: so too with respect to contracts of sale, they may be either absolute or qualified. It is not only a principle of justice, but a principle of law, that the subject matter of the contract may be made a collateral guarantee of its fulfillment. Hence it is competent for the seller to secure himself by taking a mortgage of the thing sold; a very common case and respecting which no doubt can be entertained but that the lien attaches upon the mortgaged goods, into whose hands soever they may come. Haney by the terms of his contract with Dupree, acquired no present ownership in the horse; this investiture of right depended upon a future contingency, viz: his paying on the day fixed on, one half the whiskey; till then he had but a right of possession—at any rate the stipulation in the contract shews that the horse was by their agreement to remain a guarantee to Dupree the seller, that the terms of sale would be complied with; and in default, that his ownership and

RICE, vs. HANCOCK.

controul was to remain unimpaired by the contract. The defendant's intestate knew this, and knowing it, agreed to comply with the terms of Haney's contract. He purchased with a full knowledge of all the circumstances attending the first contract and placed himself precisely in Haney's situation as to the right which he acquired. Among creditors, he who sells a chattel and looks to it as the indemnity which is to secure him in the sum agreed to be paid, is certainly more to be favoured than one who may or may not have trusted upon the presumption of the right of property being in the possessor.

In this case, I think that Haney acquired no immediate right to the horse which he obtained possession of by the contract, but it depended upon a contingency, to wit, his paying the whiskey; and failing therein, Dupree was privileged by the contract to take back his horse; a right reserved at the time of the contract. Kendrick placed himself in Haney's shoes, and the defendant Harrington, in taking the horse from Dupree, subjected himself in law to the action brought against him. I think that the decree should be set aside, and the case reinstated on the docket.

Colcock, Richardson, Huger, and Johnson, Justices, concurred.

Thompson, for motion

Clendenin and ——— contra.

MANSON RICE, vs. JOHN HANCOCK.

Defendant agreed to pay a book account at sixty days, and if he should fail to do so, to pay interest from that period. Held that the interest could not be recovered on the common count for goods sold and delivered.

Defendant's having given an absolute bill of sale for a slave, stating a past consideration; held not to preclude him from shewing that no consideration was in fact received and that Plaintiff was to account for the value.

THIS was an action of assumpsit, in which it was insisted that the plaintiff was entitled to recover, among other demands,

RICE, vs. HANCOCK.

interest on a book account, for goods, wares and merchandize. A witness examined on the part of plaintiff, proved that the defendant agreed to pay the plaintiff the amount of the book account in cotton, within sixty days from the delivery of the goods, and if he did not pay it in cotton within that time, that he would pay interest after the expiration of sixty days: but the presiding judge charged the jury that the plaintiff was not entitled to recover interest on the book account.

The defence was a set off of the amount of a slave; for which one of the witnesses proved the defendant had executed an absolute bill of sale to the plaintiff, stating a consideration already received. An objection was made to the admission of any testimony to contradict the bill of sale, as to the statement of a consideration already received. This was overruled, and a witness introduced who proved the acknowledgement of the plaintiff, that the bill of sale was made to enable him to sell the slave, on account of the defendant; but that plaintiff stated at the same time, that he had settled with the defendant or credited him with the amount for which the slave was sold.

The jury found a verdict allowing the defendant a discount of three hundred dollars and interest; but did not allow the plaintiff any interest on the book account: The plaintiff appealed and moved the constitutional court for a new trial on the grounds:

1st. Because the presiding judge charged the jury that the plaintiff was not entitled to recover the interest on the book account, after the expiration of sixty days:

2d. Because the jury allowed a discount of three hundred dollars and interest, the value of a negro, for which the defendant had made an absolute bill of sale, stating a past consideration to the plaintiff; and the witness introduced on the part of the defendant, to prove the discount, stated in his testimony, that at the time of the plaintiff's acknowledgement that he was to sell the negro for the defendant, he also stated that he had settled with the defendant or had credited him for the amount of the sale:

RICE, vs. HANCOCK.

3d. Because the verdict was contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice Gantt:

The first ground taken in the brief, is an objection to that part of the charge of the presiding judge, which directed the jury not to allow the plaintiff interest on the count for goods sold and delivered, after the expiration of sixty days.

As a general principle, it cannot be denied that an account for goods sold and delivered will not carry interest. *3 Wilson, 206.* The right of the plaintiff to recover interest in this case was contended for, because the defendant, when he purchased, the goods, entered into an express verbal contract to pay for them in cotton within two months, and on his failing to do this, he agreed that he would pay interest on the account after that time.

As respects the pleadings in this case, it is to be observed that the count in the declaration for goods sold by the plaintiff to the defendant, was the general or common count, usually inserted in the action of *indebitatus assumpsit*. There was no count setting forth the special agreement of the defendant, to pay for the goods within a prescribed time in cotton, or that he would pay interest after that period. When therefore it is made to appear that a special contract subsists between the parties and remains of force, the law is very clear that a plaintiff will be precluded from recovering on a common count. In this case, the proofs offered by the plaintiff, shewed that a special contract was made, and was then subsisting and of force, and there being no count in the declaration founded thereon, the plaintiff in strict law ought not to have been permitted to recover any thing on the count relied on. *2 East. R. 147; Doug. 23.*

The 2d. ground taken in the brief for a new trial is, "because the jury allowed a discount of \$300 and interest, being the amount of a negro, for which the defendant had made an absolute bill of sale to the plaintiff."

The argument used to support this objection is, that the court permitted the evidence to go to the jury which contradicted the tenor of the bill of sale, which on its face expressed

RICE, vs. HANCOCK.

the consideration which the plaintiff had given for the negro. If the evidence which was received had gone to contradict the bill of sale, the argument would be conclusive that the presiding judge had erred in permitting it to go to the jury; for the law is well settled, that parol evidence shall not be admitted to annul or substantially vary a written argument.

But the object and design of the bill of sale was to transfer the right of property in this negro to the plaintiff; not to stop the defendant from any future investigation respecting the consideration agreed to be paid for him:

The consideration to be paid for the negro, might or might not have been inserted in the bill of sale, and the transfer would in law have been as effectual the one way as the other. The insertion is more a matter of form than substance, and in no event can preclude a party from enquiring into it. Had the defendant offered evidence to shew that the bill of sale was intended to transfer a less interest than what was expressed therein, or that another negro than the one described was intended, &c. then such evidence would be in contradiction to the deed and not admissible. In transactions of this kind, it is well known that the consideration expressed in the instrument is not always paid down, but secured by bond, note or verbal promise; and it is the business of the purchaser to fortify himself with the evidence of having paid the consideration agreed to be given. It is every days practice to enquire into the consideration of parol agreements, and to shew a total or partial failure of the same; and as respects deeds, parol evidence may be admitted to prove other considerations than those mentioned therein. As where the consideration expressed in a deed was £28, parol evidence was admitted to prove that thirty pound was the real consideration. 3d T. R. 474.

In the case before us, Hancock, the defendant, being indebted to the plaintiff and reposing much confidence in him, executed the bill of sale, to the intent that the plaintiff might sell the negro in town and apply the proceeds *pro tanto*, in payment of the account. That nothing was paid down, is evidenced by the explicit declarations of the plaintiff. Take

SATTERWHITE, vs. M'KIE.

his words as set forth in the brief: "He was to sell the negro for the defendant:" "He had settled or accounted with the defendant," or had "credited him with the amount of the sale." If the plaintiff had done either, how was it made to appear. The onus lay upon him, after having acknowledged that the sale of the negro in town was for the defendant. The conclusion is irresistible, that he had never accounted to the defendant for the price of the negro, and consequently that the jury were properly instructed to deduct from the plaintiff's claim the price of the negro, with interest thereon from the time he was sold.

The plaintiff can take nothing by his motion.

Colcock, Richardson, and Nott, Justices, concurred.

J. J. Caldwell, for motion.

John Caldwell, contra.

The Administrators of JOHN SATTERWHITE vs. DANIEL M'KIE:

Defendant made a note of hand, payable at twelve months, and unless paid at the day, to bear interest from the date; held that defendant having failed to pay at the day, was bound for the interest.

DANIEL M'KIE gave a promissory note to the administrators of John Satterwhite deceased, payable in twelve months after date; but if not then paid, the note to carry interest from the date. M'Kie failed to pay the note when it became due. The administrators commenced an action thereon, and M'Kie the defendant confessed a judgment, with interest from the date of the note; which was duly entered up and execution issued thereon. At the Spring Term, 1824, it was moved that the interest which had accrued between the date of the note and the time when it became due, should be stricken from the judgment. This motion was granted. The object of the present appeal was to reverse that order.

The opinion of the Court was delivered by Mr. Justice Gantt.

DAVIS. vs. MILLER,

The law by which a contract is to be governed, is resolved into the terms whereby it is entered into; provided that the contract be consistent with morality and not repugnant to law or the principles of public policy. In this case, it was certainly competent for M'Kie, who had received a full and adequate consideration, to contract for the payment of interest upon the debt he owed, from any point of time after he had received the consideration for which he became a debtor. The case would not be varied by supposing that the note had been drawn with interest from the date, but the interest to be remitted on his paying the sum due, on the day assigned for the payment. This is the obvious meaning and intent of the parties to the contract. The laches of M'Kie could alone render him responsible for interest, and having incurred this responsibility by his default of payment, he voluntarily confessed a judgment, according to the tenor of his contract. This was doing no more than what the law and good faith required of him. The judgment as entered up on the confession of the defendant, must stand, and the order made for striking out interest is reversed.

Colcock, Huger, Richardson and Johnson, Justices, concurred.

Irby, for motion,

Thompson, contra.

JOHN DAVIS, vs. CHARLES MILLER.

Principal and surety to a joint and several promissory note were sued by separate actions. At the first court an appearance was entered for the principal, but not for the surety. Upon affidavit by the principal, that he was unapprized of the action against his surety or he would have caused appearance to be entered, and that he had a considerable counter demand, which would be lost, plaintiff being insolvent, if judgment should go against the surety; leave was given to enter appearance at the second court.

THIS was an action on a joint and several promissory note, signed by John Miller and Charles Miller. Separate actions

MILLER, vs. DAVIS.

were brought against them, and the writs lodged in the sheriff's office, 2d March, 1824.

John Miller caused an appearance to be entered for himself, at March Term, 1824, but no appearance was entered to the action against Charles Miller, the present defendant.

At October Term last, for Pendleton district, a motion was made that an appearance might be entered for Charles Miller, founded upon an affidavit of John Miller, to the following effect, viz: That the deponent is the principal in the note on which the action against Charles Miller was brought; that he was not apprized that an action had been instituted on the note against his security, or he would have had an appearance entered in his behalf; stating as a reason why he would have done so, if that any defence made by the deponent would be unavailing, if judgment should be obtained against his security, as he, the deponent, would thereby lose a considerable sum justly due to him from the plaintiff, who is not solvent."

The presiding judge refused the motion, and the case was ordered to be referred to the clerk. It was now moved to reverse the decision thus made, and that the defendant be permitted to enter an appearance under the circumstances detailed.

The opinion of the Court was delivered by Mr. Justice Gantt.

Motions of this kind are directed to the discretion of the court, which should be exercised so as to preserve the spirit and intendment of the rule, without an essential violation of what is due to justice and right. Here a double action was brought, where one might have sufficed; and the principal in the note, John Miller, whose duty it was to protect his security from inconvenience and loss, has testified to facts which authorise the conclusion, that injustice will be done unless the indulgence asked for be granted by the court.

The court are of opinion that the application made for leave to enter an appearance in the case for Charles Miller, was reasonable under existing circumstances. The presiding judge acquiesces in the view now taken by the court; and the motion to reverse the decision made below, and for

CATES, vs. CURETON.

leave to enter an appearance for the defendant, Charles Miller, is allowed to prevail.

Richardson, Huger, and Johnson, Justices, concurred.

Colcock, dissenting.

Harrison and Earle, for motion.

Davis and Lewis, contra.



AARON CATES et. al. vs. THOMAS T. CURETON.

Leave given to amend, by adding a new count, after demurrer and joinder.

At the spring term of 1824, O'Neal for plaintiff, moved to add another count to the declaration which had been filed in this case. Caldwell for defendant, opposed the motion, stating that before the rule to plead had expired, a general demurrer had been put in to the declaration, and to which there was a joinder in demurrer.

The opinion of the court was delivered by Mr. Justice Gantt.

Whilst the proceedings remain in paper, or are in fieri, as it is termed, that is to say, before they are recorded, amendments are allowable. *Str.* 11.

and proceedings may be amended; let them be in what stage they may, and whether in matter of form or substance, provided they are in paper. *2 Burr*, 756.

No objection was made on the ground of the motion having been made after the end of the 2nd. term, if such were the fact. In *1 Wilson*, 149, 223, it is said, a plaintiff cannot by way of amending his declaration, after the end of the 2nd. term, add a new count; because it is like a new declaration, and he cannot declare after the 2nd. term. But exceptions to this rule will be found in the English authorities; one will be seen in *Str.* 890. The same liberty of amending is given in cases of demurrer, whilst the proceedings are in paper. *Salk.* 520.

So a demurrer may be withdrawn and party be permitted to plead, and go to issue on the merits; *Doug* 385; and in *6. D. and E.* 173, *Steel vs. Sowerby*, Lord Mansfield quoted a case

GAZOWAY, vs. MOORE.

in which the court gave leave to amend after three solemn arguments on demurrer.

Amendments are in the discretion of the court, and when allowed, ought to be upon equitable terms, so that the other side may not be prejudiced; 2nd. *Burr.* 766; as paying costs, not delaying the adverse party, giving him time to plead de novo, and the like. *Salk.* 47; *Wils.* 7. 223; 3 *Salk.* 31.

In this case it was ascertained that the cause could not be tried at the term when the motion to amend was made.

The above authorities are deemed sufficient to shew that amendments of the kind allowed on this case are not unusual, but are warranted by established practice.

The motion to reverse the order to amend is refused.

Colcock, Huger, and Johnson, Justices, concurred.

O'Neal and Johnson, for motion.

J. J. Caldwell, contra.

WILLIAM GAZOWAY, vs. ALEXANDER MOORE.

Defendant gave plaintiff a note for \$80, "for the hire of his negro man A." Held that it was not competent for plaintiff to prove a verbal stipulation to pay an additional sum, if cotton should bear a certain price.

THIS was an appeal from the decision of a magistrate, tried at the last Fall Term for York District, before Johnson, justice, who affirmed the judgment. It appeared from the certificate of the magistrate, that the appellant Moore had hired of Gazoway a negro man, and gave for the hire a note of the following tenor and effect:—

"*January 6th, 1823. On the first day of January next I promise to pay to Mr. Gazoway, or order, eighty dollars for the hire of his negro man Abraham.*

(Signed)

A. MOORE.

"*Test—THOS. BARRON.*"

This note Moore paid and took up when it became due. Gazoway however claimed a further sum of twenty dollars, for

GAZAWAY, vs. MOORE.

the recovery of which he sued out a warrant of the magistrate. He proved before the magistrate that the defendant, Moore, had verbally agreed to pay twenty dollars more than the sum expressed in the note, provided cotton should bring \$3 per hundred that season, and further evidence was offered to shew that the price of cotton had risen to that sum. The magistrate gave judgment for the additional twenty dollars, and on appeal the magistrate's judgment was affirmed. It was now moved that the decision made by the presiding judge should be reversed, on the ground that the written contract was conclusive as to the terms of the hiring.

The opinion of the Court was delivered by Mr. Justice Gantt.

The note which was taken to secure the payment of the hire, expressed on its face the consideration which was to be paid. It is unqualified in the terms used, and purports to be the entire sum which by the agreement was intended to be paid for the services of the negro. Whatever views therefore may have been entertained by the parties previous to giving the note, they must give way to the certain and fixed terms expressed in the writing which consummated the contract between them. It would be of dangerous tendency to permit a written contract, the terms whereof are explicit and constitute the law by which it is to be judged of, to be impugned and varied by oral testimony. The substance and intent of the written agreement in this case, was to shew what was the contract on the part of Moore, and to what extent he was to be answerable for the hire of the negro. Now as parol evidence cannot be admitted to annul or substantially vary a written agreement, 3 *Wils.* 275, this rule would be clearly violated, if it were competent for the plaintiff to prove an additional sum beyond that expressed in Moore's written agreement for the hire: "Parol evidence shall not be received to prove an additional rent beyond that expressed in the written agreement for a lease." 2 *Bl. Rep.* 1249; 4 *Comyn's Digest*, Tit. Evidence, c. 5. Nor shall parol evidence be permitted to explain a writing where the meaning is plain, "as if a man agree in writing to sell

STEWART, vs. FOWLER.

Blackacre for £1000, parol evidence shall not be admitted that he intended Whiteacre should also pass."

If then it be law that parol evidence cannot be received to vary what is clearly and substantially set forth in a written agreement; if on a lease expressing a certain rent, no additional rent can be established by parol evidence, then I think it clearly follows that when the sum is expressed (as in this case) which the hirer is to pay, no additional sum can be claimed or established by parol evidence. There would be no end to litigation were it otherwise; a man entering into a contract might be made to answer in as many different ways as the terms of the contract might be varied by human ingenuity; this would lead to great injustice, cruelty and wrong—fortunately for mankind this is not a rule of jurisprudence here or elsewhere. But this doctrine has been so ably and fully commented upon by my brother Nott, in the case of *McDowall, vs. Beckly*, 2 *Const. Decs.* 265, as to supercede the necessity of any comments on my part. The principle now involved was decided in that case, which is "That parol evidence cannot be admitted to contradict, add to, or vary the terms of a written instrument. The motion therefore is granted.

Colcock, Richardson, and Nott, Justices, concurred,

Williams, for motion.

Rogers, contra.

JOHN STEWART, vs. CHARLES FOWLER.

The act against usury, after fixing a penalty of three times the amount of any usurious loan, to be recovered by action of debt, &c. limits the commencement of the action to six months after the offence committed. Plaintiff lent \$100, on usurious interest, and received various sums on account of the loan, more than six months before action brought, and the balance of principal and usurious interest, within six months: Held that plaintiff was entitled to recover three times the amount originally loaned.

THIS was an action of debt, on the act of 1777, *Public Laws*, 286, to recover treble the amount of a sum of money lent

STEWART, vs. FOWLER.

by the defendant to one William Lyles, on which he accepted and received interest, at a higher rate than 7 pr. cent per annum.

The declaration contained three counts. The first count charged, that the defendant had taken "accepted and received the sum of ——— by way of corrupt bargain for the loan of \$100," &c. which was above the rate and proportion of seven dollars, for the forbearing and giving day of payment of \$100.

The second count charged that defendant upon a certain other corrupt bargain, made &c. did take, accept and receive of the said William Lyles, in consideration of one hundred dollars loaned to the said William on or about the 22d January, 1818, the sum of \$5, on or about the 2d of April of the same year. The further sum of \$5, on or about the 22d July, of the same year. The further sum of \$10, on or about the 22d January, 1819. Also the further sum of \$50, on the 26th February 1820, and finally on the ——— day of March, 1820, the sum of eighty four dollars, the balance due on the said bargain, which said several sums of money, so taken, accepted and received by the said Charles, for the sum of one hundred dollars and the forbearing and giving day of payment thereof, from the time of the loan aforesaid until it was paid as aforesaid, exceeds the rate of \$7 for the forbearing of \$100 for one year; contrary to the act, &c. Whereby an action accrued to the said John, to have and demand treble the amount of the said sum of money, so loaned, &c. The third count is like the first, except that it charges that the sum received was at the rate of 20 per. cent, per ann. and in both, the amount received was left in blank.

The evidence was, that on the 22d January, 1820, defendant lent to William Lyles \$100, and that it was agreed that he should pay interest on it, at the rate of 20 per. cent per ann. and that in pursuance of this agreement, the several sums of money mentioned in the second count of the declaration were paid and received by the defendant.

The act limits the commencement of the action to six months after the offence committed, and all three payments except the last (\$84) were made more than six months before

STEWART, vs. FOWLER.

the action was brought; that was confessedly within that time. This amount was made up of \$70, a balance due on the note, after deducting the preceding payments, and \$14 of interest, calculated at 20 per. cent.

The jury, under the direction of the court, found a verdict for the plaintiff; and this was a motion.

1st. For a nonsuit, on the ground that the evidence did not sustain the case stated in the declaration.

2d. For a new trial, on the ground that the verdict is for more than treble the amount received within six months before the action was brought.

The opinion of the court was delivered by Mr. Justice Johnson.

1st. motion for nonsuit.

The facts stated in the second count of the declaration are precisely in accordance with the truth of the case; and as applied to this count, the ground of the motion for nonsuit rests on the position, that the receipt of the usurious interest on the balance of \$70, that was due of the principal, does not support the allegation that it was for the forbearance of \$100, the sum originally lent.

The act, after declaring all contracts void in which a greater rate of interest is reserved than seven per cent. per ann provides that if any person shall "take, accept, or receive, by way or means of any corrupt bargain, loan, exchange, shift or interest of any monies, wares, merchandizes," &c. "he shall forfeit and lose for every such offence the treble value of the monies, wares, merchandizes, &c. so lent, bargained, exchanged, shifted, or taken." And concludes with a proviso, that actions to recover the same shall be brought in the life time of the offender and within six months after the offence committed.

It is not necessary to resort to construction, to ascertain the meaning of the legislature in reference to this question. It is obvious that the offence intended to be punished by the penalty which the act imposes, consists in the act of receiving illegal interest, in pursuance of a corrupt agreement. Let it be asked then, what was the agreement between these parties? It is

STEWART, vs. FOWLER.

answered by the facts stated in the record and proved on the trial. The defendant lent Lyles \$100, and it was agreed that he should, and he did in fact pay him at the rate of 20 per cent. per ann. for forbearance.

It is objected that the amount received within six months before action brought, was for the usury on \$70, and not for the \$100. There was no proof of any new agreement with respect to the interest or usury on the \$70, and if legal implication be resorted to, it could not extend beyond the legal interest, and the excess must be put down to the original corrupt agreement. So that plaintiff was right in declaring in reference to that agreement, and his count is supported by the proof.

This view of the question is also supported by authority. In *Mallory vs. Bird*, cited in *Pollard vs. Scholy*, cro. Eliz. 20, it was held that if one contracts to have more than the statute allows, but he takes nothing of the interest contracted for, he is not punished by the statute. But if he takes any thing, if it be but a shilling, it is an affirmance of the contract and he shall render for the whole contract.

This motion, in reference to the other counts in the declaration, is founded on the fact that in both, the sums charged to have been received are in blank. The disposition made of the preceding question has rendered any opinion on this unnecessary; but I should incline to the opinion, that if it is not cured by the verdict, the court would, if indispensable, give leave to amend.

2d. Motion for a new trial. This motion is founded on the position that plaintiff was only entitled to recover three times the amount received within six months before action brought.

This question was necessarily involved in the ground taken for a nonsuit, and the reasoning and authority relied on apply with equal force to this. The defendants' liability is with reference to the corrupt agreement, and if he received but a shilling, it was an affirmance, and he shall render for the whole contract. Motion refused.

Colcock, Richardson, Huger, & Gantt, Justices, concurred.

O'Neale and Irby, for motion. *P. Farrow*, contra.

JESSE CLEVELAND, vs. THOMAS DARE.

Defendant's property being taken in execution at the suit of A. B. for \$1400, defendant, in order to obtain one month's stay of sale, agreed to pay \$100 and gave the note on which the action was brought to the plaintiff, to whom A. B. was indebted; plaintiff crediting A. B. with the amount, and he guaranteeing the payment of the note to plaintiff: Held that the note was usurious, and void in plaintiff's hands.

ASSUMPSIT on a promissory note. Defence—Usury. The defendant's property was taken in execution by the sheriff of Spartanburgh district, at the suit of A. Benson, for \$1400, and was advertised for sale on the first Monday in September, 1823. Defendant agreed with Benson that if he would indulge him until the next sale day (the first Monday in October following) he would give him \$100, and in pursuance of this agreement he gave the note on which this action is brought to the plaintiff. The inducement to make the note payable to the plaintiff, was that Benson was indebted to him; and upon the execution of the note and Benson's undertaking to guarantee its payment, he credited him with the amount.

The jury found for the defendant, and a motion was made for a new trial on the ground of misdirection of the court in the following particulars:

1st. In charging the jury that the contract as between Benson and defendant was usurious:

2d. In charging that it was usurious as between plaintiff and defendant, if the consideration was known to plaintiff.

The opinion of the court was delivered by Mr. Justice Johnson.

If we were to consider the first proposition, with reference only to the inducements which operated on the defendant to enter into this contract and the probable advantages that may have resulted to him from it, we should find it difficult to detect any thing legally usurious or immoral in the transaction. But if we examine the inducements which operated on the other party to the contract, the attempted acquisition of unlawful gain is clearly detected. He secured to himself an interest on the debt which the defendant owed him, at the rate of about eighty-five per cent. per annum, and if such a contract was

CLEVELAND vs. DARE.

good for one month, it must necessarily be so for a year and so on ad infinitum.

An ingenious usurer would find no difficulty in bringing about a state of things with respect to his loan, embraced in the principle contended for in support of the motion; all contracts founded on usurious consideration would necessarily fall into that channel, and the act against usury would become a dead letter. The authorities are I think clear on this point. *Pollard, vs. Scholy, Cro. Eliz. 20.* "Pollard sold to the defendant some oxen, to be paid for at a given time; when the time was arrived, Scholy required a longer day for payment and Pollard granted it, paying to him so much wheat as exceeded the legal interest. The defendant, in debt, pleaded the statute against usury and would avoid the contract, and the opinion of the justice was that the statute doth not make the contract void which was duly made; doth only void all contracts for usury, and this last contract is void, being against the statute; but the first was good being made bona fide. (See also *Spurrier, vs. Mayoss, 1 Ves. jun. 531.*

I have not been able to discover any foundation for the second ground of the motion. If it be placed on the footing, that the plaintiff had paid a full consideration for the note, it is answered that this is not supported by the facts. It is true, that plaintiff credited Benson with the amount, but it is equally true that before he did so, he required that Benson should guarantee the payment of the note; so that as between him and Benson, he is in precisely the same condition that he was before he gave the credit. Admitting however that it was otherwise, it could not effect the question. It has been before shown, that as between Benson and the defendant, the contract was usurious; and if it was known to plaintiff, he was as much a party to it as if he had been the person benefited.

The view taken by the circuit court, placed this question on a more favorable footing for the plaintiff than I am inclined to think was justifiable in point of law. It is universally admitted that a promissory note, founded on an usurious consideration is void, even in the hands of endorsee without notice;

FARROW, *vs.* MARTIN.

and I cannot distinguish between the two cases in the application of the principle. It is enough for the present however, to decide the case before the court. Motion refused.

Colcock, Gantt, and Nott, Justices, concurred.

Farrow, and Henry, for motion.

Irby, and Goodman, contra.

RICHARD FARROW *vs.* JAMES MARTIN.

Defendant by a written agreement, engaged "to meet" plaintiff, and make him title to a tract of land; a time and place of meeting were appointed, and defendant attended accordingly; held. that plaintiff, having failed to attend at the time and place, and not having demanded title at any other time, could not sustain the action for breach of the contract.

THE plaintiff declared in assumpsit, on the following written contract: "August 31st, 1820." "I James Martin do promise to meet said R. Farrow and give unto him rights for one hundred and sixty acres of land in the Missouri Territory, for which I have received a note of him, for one hundred and twenty dollars" (signed) "James Martin." The breach assigned was that the defendant had not made the title according to this agreement.

A witness called by the plaintiff, stated that at the time this contract was entered into, the parties agreed to meet a few days after either at the "Cross-Keys," or "Cross-Anchor" for the purpose of carrying it into effect: these places were in the same neighbourhood, and the witness could not recollect, and would not undertake to say which was the place agreed on; but was inclined to think the latter.

The witnesses called by defendant proved that on the day appointed the defendant went to the Cross-Keys for the avowed purpose of meeting the plaintiff, to carry the contract into effect: That titles were prepared and ready to be executed, but the plaintiff did not attend.

There was no proof that the plaintiff attended at either place; nor was there any that he ever appointed any other

FARROW vs. MARTIN.

place of meeting, or that he had even requested defendant to make the titles before the commencement of the action.

The presiding judge, being of opinion that if the case went to the jury, the verdict must be for the defendant, by which the plaintiff would have been for ever concluded, directed a non-suit; and this was a motion to set it aside on the ground, that the contract imposed a legal liability on the defendant, and that it was incumbent on him to have made or tendered titles to the plaintiff, without any request from him.

The opinion of the Court was delivered by Mr. Justice Johnson.

In the interpretation of contracts, that which is derived from the plain and obvious intention of the parties, to be collected from the whole instrument, must in general prevail; and if this rule is applied to this agreement, I think it will clearly follow that it imposed on the plaintiff an obligation to meet the defendant, and accept the titles. It does impose on the defendant, in explicit terms, the obligation to *meet* plaintiff and to *make titles*, and by a necessary implication, the plaintiff was bound to put it in his power to do so. Now if plaintiff would not *meet*, or would not accept titles, it was impossible, and that without any fault of defendant, that he could keep his contract.

A practical interpretation of the contract is I think found in the conduct of these parties; they acted upon it immediately; a time and place were appointed, and if the evidence proves any thing, it shows that defendant kept his agreement and was ready to do what was required of him, and did do all that was in his power.

It is a settled principle, that to enable a party to recover for the breach of a contract, it is incumbent on him to show that he has done every thing which was required of him, to enable the defendant to perform his part; and it is shown that there was an obligation on the plaintiff to meet the defendant at the time and place appointed, to carry the agreement fully into effect. He failed to do so; nor did he give the defendant any other opportunity to do what was required of him, before

BLACK vs. ERWIN.

he brought his action. I think therefore that the nonsuit was properly ordered. Motion refused.

Colcock, Nott and Gantt, Justices, concurred.

Farrow, for motion.

Herdon, contra.

WILLIAM BLACK, vs. WILLIAM ERWIN.

An executor, authorized by will to sell lands, cannot make an attorney to convey; if one have a bare authority, coupled with a trust, he cannot act by attorney.

TRESPASS to try titles to land. The land in dispute was granted to Thomas Black, now deceased. To shew title in the plaintiff, the will of Thomas Black was produced, by which his executors, John and James Black, were authorised to sell the land for the purpose of partition amongst his children. The plaintiff then produced a deed signed by John Black, one of the executors, and by Joseph Steel as attorney for James Black, the other executor. The authority under which Steel acted in the execution of the deed, was a letter of attorney from James Black, and the clause from which it was supposed he derived this power, was to the following effect: "And I, the said James Black, do hereby authorise and empower the said Joseph Steel to do, act and perform all things in my business in the State of South-Carolina, as fully and in as ample a manner, and to do all things in the premises, as fully as I myself might or could do, were I personally present."

The court being of opinion that the land did not pass by this deed, non-suited the plaintiff; and this was a motion to set aside the non-suit on the ground, that the letter of attorney being general, Steel was fully authorised to join John Black in the execution of the deed, and that the deed so executed vested the title in plaintiff.

The opinion of the court was delivered by Mr. Justice Johnson.

Admitting that an executor may legally constitute an attorney to sell the lands of his testator, it may well be doubted

BLACK vs. BLACKS.

whether a general authority to his agent, in his individual character, without reference to his representative character as executor, would confer such a power. But that an executor cannot act in such a case by attorney, is too clear to admit of doubt.

The general rule is, that if a man have a bare authority, coupled with a trust, he cannot act by attorney; for this being a trust and confidence reposed in him, he cannot transfer it to another; 9 Rep. 75; 6 Roll. Abr. 330, cited in 1 *Livermore on Agency*, 29; and the very case under consideration is put by way of illustration.

Under the act of the legislature, a majority of the executors are authorized to convey lands, directed to be sold by the will of the testator. But in this case, there were but two, and it follows that to convey the title both must join in the deed. The motion refused.

Colcock, Gantt, and Richardson, Justices, concurred.

Clendinen and Hill, for motion.

Williams, contra.

MIRABA BLACK vs. WILLIAM BLACK; THOMAS BLACK vs. THE SAME.

Plaintiffs were the children of T. B. deceased, who by his will directed lands to be sold by his executors, for partition amongst his children: the executors agreed to sell certain of the lands to defendant and gave bond to make him titles, and defendant with their consent gave notes to the plaintiffs, for the amount to which they would be respectively entitled out of the proceeds: Held that defendant, in actions on these notes, could not set up in defence the failure of the executors to make him titles, according to the condition of their bond.

THOMAS BLACK, the father of plaintiffs, by his last will and testament, directed that a tract of land, of which he died seized, should be sold by his executors and the proceeds divided between some of his children, amongst whom were the plaintiffs, John and James Black, who were appointed executors, agreed to sell the land to defendant, and entered into a bond to make him titles; in consideration whereof, the defendant with

BLACK vs. BLACKS.

the consent of the executors, gave to the plaintiffs the notes on which these actions were brought, being the amounts to which they were respectively entitled out of the proceeds of the sale, according to the provision of the will. These facts were known to the plaintiffs, and the defendant would have defended himself against these actions, on the ground that John and James Black, the executors, had failed to make him titles to the land, according to the condition of their bond. But the jury, under the direction of the court, found verdicts for the plaintiffs, and this was a motion for new trial, on the ground that there was a privity between the plaintiffs and the executors, who sold the land for their benefit; that plaintiffs stand in the situation of the executors, having taken the notes with a perfect knowledge of all the facts, and that the consideration of the notes has failed and the defendant had a right to be discharged from the payment.

The opinion of the court was delivered by Mr. Justice Johnson.

A general and very superficial view of the circumstances of these cases will remove all difficulty about the questions made in the brief. If we look to the nature of the contract, the consideration on which the notes were given clearly was the execution of the bond by John and James Black to the defendant. The plaintiffs undertook for nothing else; they could not make the titles, nor could they enforce the executors to do so, and the law will not imply an undertaking to do a thing which the party has not the power to do.

The unreasonable consequences which must result from allowing this defence, is a sufficient reason for rejecting it. If it had prevailed and verdicts had been found for the defendant, he would have been discharged from the payment, and yet he might compel the executors to perform the condition of the bond. Motion refused.

Richardson, Hughes, Colcock, and Gantt, Justices, concurred.

Clendinen and Hill, for motion.

Williams, contra.

THE STATE vs. JAMES SOTHERLEN.

An Indictment will not lie for rescuing goods, taken in execution, out of the possession of a constable; there being no assault on the constable.

THE defendant was indicted for assaulting John Spriggs, and taking out of his custody a Cow and Calf, which as one of the constables of Greenville district he had taken in execution. The taking was not denied, but there was no proof of any personal violence to the prosecutor, Spriggs; and the only question in the case was, whether an indictment would lie for thus rescuing goods taken in execution.

The presiding judge, entertaining doubts on this question, directed the jury to find the defendant guilty, for the purpose of bringing it up for the consideration of this court: and the same question was now made the ground of a motion for new trial.

The opinion of the court was delivered by Mr. Justice Johnson.

In the consideration of this case, it will not be contraverted that an indictment will lie for an assault committed on a ministerial officer, in the discharge of the duties of his office. The only thing to be determined is the abstract proposition, whether an indictment will or will not lie for rescuing goods taken in execution by the proper officer, under legal process.

The general rule which it is supposed embraces this question, is that the obstruction of the execution of lawful process is an offence against public justice of a very high and presumptuous nature, and as such, is punishable by indictment. 4th, Black. Com. 128.

This principle includes a numerous class of cases, amongst which the most prominent, and those by which its application to the present cases are best illustrated, are those of rescuing goods distrained for rent and pound breach Bacon's abr. tit. rescue, A. The reason why this mode of proceeding was allowed in those cases obviously is, that before the stat. 2d W. & M. chap. 5. the party injured could not maintain an action against the wrong doer, nor could he proceed in the collection of his rent without the possession of the goods; and thus a proceeding authorised by law was holy frustrated: and

STATE vs. SOTHERLAN.

It appears to me that the principle rests solely on the foundation that the act done was of such a nature as arrested justice in its progress, short of the end in view—the determination of the rights of the parties.

If we extend this principle beyond its legitimate bounds, we shall encounter one of equal authority and still more universal in its application. The proceeding by indictment was only constructed for the purpose of punishing public offences, and never can be applied to the redress of private injuries; and it will only be necessary further to enquire whether the act complained of in this prosecution, belongs to the first or the last of these.

If a sheriff take goods in execution, they are, *eo instanti*, vested in him, and he may maintain trespass or trover for them; and he is liable to the party at whose suit they are taken for their value; *Bacon, Abr. Tit. rescue, A*: the party injured has an action against the wrong-doer.

The only conclusion which can be drawn from this authority is, that when the execution has been levied, it is *functus officio*. It has placed in the hands of the sheriff and invested him with a property in the goods, and has answered all the purposes for which it was intended. A trespass committed upon it was therefore a private injury, and consequently an indictment will not lie.

A strong, if not conclusive argument in favor of this view, may I think be drawn from the fact, that none of the books contain a precedent of an indictment for rescuing goods taken in execution. It will scarcely be insisted that if the common law authorised this mode of proceeding, it would have slumbered for so many ages.

The cases referred to and those to be found in the books, generally relate to the sheriff exclusively; but they apply with equal force to a constable when acting within his legitimate sphere. Motion granted.

Colcock, Gantt, and Huger, Justices, concurred.

R. P. BOULWARE, *vs.* WILLIAM M'COMB.

Allegation of a summary process, that parties subscribed an agreement, with their own proper hands, was supported by proof that one of them subscribed by his agent.

THIS was a summary process, in which the plaintiff set out a mutual agreement between himself and the defendant, and described it as being "subscribed with their own proper hands."

The agreement produced in evidence was signed on the part of "Reuben P. Boulware, per Moses Boulware," and the proof was that it was signed by Moses Boulware, the agent of the defendant.

The defendant moved for a non-suit, on the ground that this evidence did not support the allegation, that it was subscribed by the defendant with his *own proper hand*. The motion was overruled and the jury to whom the cause was submitted, found a verdict for the plaintiff. This was a motion to set aside the verdict and for leave to enter up a judgment of non-suit, on the ground taken in the court below.

The opinion of the Court was delivered by Mr. Justice Johnson.

The principle on which this question depends, is founded on the maxim *qui facit per alium, facit per se*. The act of the agent is in law the act of the principal, and although it might have been more strictly clerical to set out the manner, yet the legal effect of an act is all that is indispensably necessary. The allegation that the defendant subscribed with his *own proper hand* was therefore well. (a) The motion dismissed.

Colcock, Richardson, Huger, and Gantt, Justices, concurred.

Johnston, and M'Dowell, for motion.

Buchanan, contra.

(a) See *Helmsley vs. Loder*, 2. Camp. 450; *Jones et. al. vs. Mars et al.* *ib.* 305; *Levy vs. Wilson*, 5 Esp. Rep. 180; *Pease vs. Morgan*, 7 John. Rep. 468.

HARDY GREGORY vs. STEPHEN WILLIAMS.

Plaintiff offered in evidence transcripts properly attested, of proceedings in the County and Superior Courts of North Carolina, containing a writ, several interlocutory orders, continuances, memorandum of a verdict and "judgment affirmed," and execution at length; but no contract or cause of action was set forth. Held that these transcripts should have been received as evidence of a judgment.

Plaintiff also offered a copy of a bond, attested by the clerk of the county court, as the cause of action on which the proceedings were founded; no connection between them appearing on the transcripts: Held inadmissible.

THE plaintiff declared in assumpsit, for money paid, laid out and expended, &c. To support the count, the plaintiff offered in evidence an exemplification of proceedings of the county court of Onslow, in the state of North Carolina, in a case, wherein the governor, for the use of the administrator of A. B. Gregory, was plaintiff, and the parties to this action were defendants. It consists of the original writ and of a transcript from the dockets of the court, beginning at January Term 1812, and terminating at October term following. It contains the orders of the court, at each term, in reference to the case, and annexed to the last, is the following: "jury charged, found for the plaintiff \$ 141, 44 and costs; appeal prayed and granted"—subjoined to this, is the bond of the parties, with J. Shackelford and James Phelyen, securities, conditioned to prosecute the appeal in the superior court for Onslow county. This proceeding is attested by the clerk and certified by the judges of that court, in conformity with the act of congress. The plaintiff also offered in evidence an exemplification of the superior court for Onslow county, also properly certified and attested; which also consisted of a transcript of the dockets, beginning with March term, 1813, and ending with March term, 1817. The following is the entry of the last term, "referred to Daniel Ambrose, Edward Williams and Silas Carter, who find an award of four hundred dollars in favor of the plaintiff; judgment therefor according to the award and costs. On motion, judgment affirmed against the security for the appeal." Then follows an execution against the parties to

GREGORY, vs. WILLIAMS.

this action and their securities, for the amount of the award and costs; on which the sheriff returns that \$ 358 20, of that amount was paid by the plaintiff in this action.

The plaintiff's counsel stated that these proceedings were founded on a bond, entered into by the plaintiff and defendant, as the securities of one Thomas Malmsberry, for the faithful discharge of the duties of the office of constable for Onslow county; and exhibited the copy of such a bond, certified by the clerk of Onslow county on a separate sheet of paper, but there was nothing apparent on the proceedings, which shewed any connection between them.

The presiding judge, being of opinion that inasmuch as the exemplification did not set out any cause of action, either in the form of contract or by declaration, it was too indefinite to be received in evidence, and sustained a motion by defendant's counsel to reject it; and nonsuited the plaintiff.

A motion was now made to set aside the nonsuit, on the ground that this exemplification ought to have been admitted in evidence.

The opinion of the court was delivered by Mr. Justice Johnson.

The attestations of the clerks of the courts, from which those proceedings come, and the certificates of the judges are in strict accordance with the acts of congress, regulating the admission of the judicial proceedings of one state in the courts of the others; and the only question is whether those exhibited in this case contain intrinsically any thing destructive of the end for which they were offered.

It is true, that they are very different in form from those used in this state; but from necessity, each state must be left to its own mode of proceeding; and we have the highest authority, (the certificates of the judges) that these are in conformity with the mode of proceeding prescribed in North-Carolina. We cannot therefore look into them for the purpose of criticizing them; but must take them as we find them, and give effect to whatever is adjudged.

· JONES, *ads.* MICKLE.

If we test these proceedings by this rule, it will clearly follow that they ought not to have been rejected. They exhibit a formal writ, by which the parties were brought into court, with divers interlocutory orders and continuances down to the judgment of the county court; an appeal from that judgment to the superior court and the final process of that court, founded on its judgment; and we are bound to give it its legal operation.

The copy of the bond, unconnected with other proceedings, was clearly inadmissible; but I am unable to discover that it was indispensably necessary to the plaintiff's case—a judgment against several, is *prima facie* evidence of a joint debt, unless the contrary appears from the record itself; and if one pay the whole amount, he may as in other cases of joint contract, recover against the others their rateable proportions. The onus of showing that it was the individual debt of the plaintiff, lies on the defendant. The bond was not therefore necessary to the plaintiff's recovery; although if connected with the record, it might have repelled any evidence offered by the defendant on this question. Motion granted.

DARLING JONES *ads.* JOS. MICKLE *et al.*

Tenant, accidentally and without the consent of the landlord, extended her possession over the ideal line of the demised premises and enclosed a very small portion of the land in dispute; of which the landlord held a junior grant: Held that this possession of the tenant for five years would not enure to the benefit of the landlord, so as to give him a title to the disputed land by the statute of limitations.

TRESPASS to try title. The defendant derived his title from a grant to the Catawba Company, dated in 1789; and the plaintiff theirs from a grant to Robert Elkins, dated in 1805, for 183 acres. The defendant having derived his title from the older grant, the only question in the case was, whether the plaintiffs were entitled to hold under the statute of limitations. This question arose out of the following state of facts: Elkins

JONES, *ads.* MICKLE.

had an undisputed title to a tract of land separated from this only by an ideal line, on which he permitted his daughter, Mrs. Lowry, to reside in the character of his tenant. About 14 or 15 years ago, and more than 5 years before the bringing of this action, in extending the improvements on this place, and connected with it, Mrs. Lowry cleared and enclosed in a fence, a small part of the disputed land (about the extent of which the witnesses differed from the one sixteenth to half an acre) being ignorant that she had gone beyond the line of the tract on which she resided. When Elkins discovered this fact, he expressed his disapprobation of it in strong terms, and gave as a reason, that it might involve him in a law suit, which he was disposed to avoid. In the year 1817, he stated to her that he had been advised that he could hold the land, and he then directed her to hold on the possession; but she abandoned it about three years after. The question was, whether this was such a possession as vested the title in Elkins under the statute of limitations. The presiding judge charged the jury that it was not, and directed them to find for the defendant, but they found a verdict for the plaintiff. This was a motion for a new trial, on the ground that the verdict was contrary to law; inasmuch as there was *no proof* of an adverse possession in Elkins, for five years before the commencement of the action.

The opinion of the court was delivered by Mr. Justice Johnson.

There is no pretence that Elkins ever was in the personal possession of any part of the disputed land. The only possession relied on, was that of Mrs. Lowry. It will not be denied that the possession of a tenant will operate as the possession of the landlord, and enure to his benefit, as effectually as if he had personally held the possession of the premises; but this can only hold good as to the premises leased: if the tenant go beyond them, he alone is responsible for the trespass, and the possession, if available, must enure to his benefit. The premises leased to Mrs. Lowry, was the land to which Elkins had an undisputed title; and it was proved beyond doubt that her invasion of the disputed land was unauthorized by him: he was

WHELLOCH, vs. BOBO.

dissatisfied with and disclaimed it, and it was not until 1817, that she could be regarded as holding in his right. Its continuance for three years only, is not a sufficient bar to the defendants right. Confining the possession of Mrs. Lowry to herself and giving to it the greatest possible effect, it could only extend to the small spot actually inclosed; as she had no written instrument which could give it a greater extent; and the verdict is then wrong, as the plaintiffs do not derive their title from her and it is for the whole tract of 163 acres.

There is another view equally inimical to the possession of Mrs. Lowry. The line between the two tracts was not clearly defined, and it was obvious that the possession is accidental and unintentional. She was ignorant where the line ran, and the possession was so limited in its extent as to divest it of that notorious and adverse character necessary to give it effect; and thus considered she would not be entitled to hold even to that extent. Motion granted.

Colcock, Richardson, Gantt, and Huger, Justices, concurred.

Holmes, for motion.

Lery, contra.

JOHN M. WHELLOCH vs. KINDRED BOBO.

Plaintiff lost on a horse race an endorsed note for \$ 500, which he afterwards discharged, by delivering a horse and sundry securities. This was an action on the Stat. 9 Ann. c. 14, to recover treble the amount. The declaration contained two counts, one for money had and received, the other for the conversion of the articles delivered. Non-suit: the endorsed note was the thing lost, not the articles delivered in payment of it.

The plaintiff declared in debt, on the Statute 9th Ann, c. 14. Pub. Laws. App. 1, p. 20, to recover treble the amount of a sum of money, won by the defendant of the plaintiff on a horse race. The declaration contained two counts: The 1st. was the general count for money had and received; the 2nd. charged that the defendant converted to his own use one horse saddle and bridle, also a note of \$ 50 on one James Crawford.

WHELLOCH, vs. BOBO.

due the plaintiff, also a debt of \$ 50, due by one John Nance, also one other debt of \$ 150, due by one Green Bobo, to plaintiff.

The proof was that the parties having agreed to run a horse race, on a bet of \$ 500, the plaintiff drew a note for that amount, payable to Mr. Hooker and procured him as an accommodation to endorse it, and this was put into the hands of the stake holder, as the stake on the part of the plaintiff. The defendant won the race and this note was delivered to him; and about six months after, the plaintiff paid the note, by delivering to him the horse, saddle and bridle, and transferring to him the debts, &c. mentioned in the second count of the declaration.

The presiding judge being of opinion that the evidence did not support either of the counts, sustained a motion for a nonsuit; and this was a motion to set aside the nonsuit, on the ground that the evidence did support the declaration.

The opinion of the Court was delivered by Mr. Justice Johnson.

The statute which gives this action, in prescribing the mode of declaring, states that "it shall be sufficient for the plaintiff to allege that the defendant or defendants are indebted to the plaintiff, or received to the plaintiff's use the monies so lost and paid, or converted the goods won of the plaintiff to the defendant's use, &c."

It is obvious that by authorising this general mode of proceeding, the legislature designed to remove all difficulties not absolutely inconsistent with the just rights of the parties, in prosecuting the action; but it is equally certain, that it was intended to apprise the defendant, to a certain general extent, of the nature of the demand upon him. With this view, the general count for money had and received was authorised, to recover money won under any circumstances, and the count for goods converted, to cover personal chattels, &c. This appears to me to give the plaintiff sufficient latitude for all the purposes of justice.

Let it then be asked, what was won on the race or what was converted by the defendant, and the answer given by the evidence is, that it was the note indorsed by Hooker. It was

HINDS, *ads.* DAVID.

got then the money claimed in the first count nor the goods &c. charged to be converted in the 2d. count; and it does appear to me that if the plaintiff had designed to delude and entrap the defendant, he could not have devised a better means than this, if the position taken by him were maintainable.

There is another view of this question. The thing won on the race was the note endorsed by Hooker; the consideration on which that was founded was the bet on the race and no other.

That was void under the statute, and imposed no legal liability; so that in truth there was nothing bet. The payments made on it afterwards by the defendant, were wholly voluntary, and it may be well questioned whether on general principles he was entitled to recover it back, or whether the statute itself has provided for it; money and goods being the only articles referred to. Motion refused.

Johnson, Richardson, Colcock, and Nott, Justices concurred.

FRANCIS HINDS, *ads.* Administrator JOSEPH DAVID.

Action on a promissory note given to plaintiff's intestate. Defendant offered as a set off, that he had signed a note as surety for intestate in his life time and paid it since his death: Held a mutual credit, which might be set off under the discount act.

THIS was an action brought on a note of hand, given to plaintiff's intestate by defendant. The defendant offered in evidence, by way of discount, the amount of a joint and several note of hand, given by intestate and defendant to one Campbell Stubbs, and proved by Stubbs, that the defendant subscribed the note as the security of intestate, and that the amount of said note was paid by defendant, since the death of intestate.

The court directed the jury that the payment made by defendant since the death of intestate, could not be allowed as a discount to a debt due the intestate in his life time; and the jury found according to such direction.

KENNEDY, *et al. ads.* GARLINGTON,

The defendant moved for a new trial, because his honor misdirected the jury,

The opinion of the court was delivered by Mr. Justice Huger.

The act of 1759, authorises a defendant "to give in evidence by way of discount," any account "reckoning, demand, cause, matter or thing, provided they be mutual." These words at least embrace credits. The question then is, did the defendant, by becoming security to the note of the intestate, give him credit. The security would not have been required, had the credit of the intestate been sufficient. It was to give additional credit to the note, that the defendant signed it. In giving credit to the note he gave credit to the intestate, and it is not improbable that he was induced to do so by the credit already given him by the intestate.

This then is a case of mutual credit, and it is unnecessary to enquire how much more than mutual credit is embraced in the words of our discount act. See the case of *Assignees of Vaughn, vs. Smith*, 3 T. R. 507, n. The motion is granted.

RODY KENNEDY, *et al. ads.* JOHN GARLINGTON.

Sum. Pro. Stated that defendants were indebted to the petitioner \$ 50, for unlawfully beating his slave. Demurrer sustained, because it did not appear whether the process was brought for trespass, or to recover a penalty given by statute.

THIS was an action brought within the summary jurisdiction of the court. The process states that Rody Kennedy, Lemuel G. Williams, and Lydall Williams are indebted to the petitioner, in the sum of fifty dollars, for illegally beating and abusing certain slaves, Hardy and Job, while quietly being in the plantation of the petitioner, some time in the month of August, 1824, and refuses payment.

To this process the defendant demurred specially:

1st, Because the plaintiff brought an action for debt, when it should have been trespass.

2nd, Because the process should have stated that the offence was committed with force and arms and contra pacem.

KENNEDY, *et. al. ads.* GARLINGTON.

3rd, Because, if the action was intended as an action of debt, to recover a penalty under any act or statute the process should have shewn that the defendants had committed an offence prohibited by an act or statute, whereby an action had accrued to the plaintiff, &c. The presiding judge overruled the demurrer; from which decision the defendants appealed. Moved to reverse the decision, and for leave to enter up judgment for the plaintiffs in demurrer.

The opinion of the Court was delivered by Mr. Justice Huger.

It does not appear from the process in this case, whether trespass or debt was intended to be brought: and this should appear, to enable the defendant to shape his defence. Although the same strictness may not be required in a process as in a declaration, yet the cause of action must not be so informally stated, as to leave it doubtful whether the plaintiff was suing for a penalty given by statute or for damages in trespass.

The motion must therefore be granted.

Nott, Colcock, and Richardson, Justices concurred.

Gantt, Justice.—This was evidently designed as an action of debt to recover a penalty; and is admitted by the demurrer to have been so; for the first cause assigned is, that an action of trespass should have been brought, instead of the action of debt.

If the action be debt, then “*vi et armis, contra pacem*” were not necessary to be inserted, as has been contended for under the 2d cause of demurrer. The act upon which this process is based, is a public one, and courts are bound to notice their provisions, without their being stated in pleading; *Cowp. 17.* *Chitty* says, that in the case of a public statute; it is not advisable to recite any part of it, for a misrecital, with a conclusion “contrary to the form of the statute aforesaid,” would be fatal. Here, however, the plaintiff has undertaken to recite the words of the statute, and has recited them strictly; having done so, it follows that there was no necessity to conclude *Contra formam statuti*. Nor is it essentially necessary in any case, where from the facts stated, it appears to the court to be a case embraced by a public statute, to conclude with the words “*con-*

426 SOUTH-CAROLINA STATE REPORTS,

HALLS, KIRKPATRICK, & Co. vs. HOWELL. SAME, vs. SAME. "ary to the form of the statute." This is generally done, according to Chitty, where enough it stated in the process, by which the case shall appear to be affected by the statute.

The act giving the penalty being therefore a public one, and the words of the act having been recited in the body of the process, and as courts are bound to notice public statutes, and it being admitted by the demurrer that the action was debt, I could see no force in the objections which were raised on the circuit against the correctness of this process to recover a penalty, & therefore overruled the demurrer: in which I am not yet satisfied that any error was committed respecting the law of the case.

Irby, for motion.

Simpson and Dunlap, contra.

HALLS, KIRKPATRICK, & Co. vs. THOMAS W. HOWELL. THE SAME, vs. ARTHUR HOWELL.

The Notary of the branch bank in Columbia, on the day that a note discounted in Bank became due, deposited a letter in the post office, directed to the drawer who resided in the country, demanding payment; and testified that it was the practice of the bank to make demands in this way: Held not a sufficient demand of the drawer, to charge the endorsers.

THESE were actions of assumpsit on promissory notes. The defendants and plaintiffs were endorsers of the notes: The plaintiffs being the last endorsers, brought the suits above stated against the defendants as prior endorsers.

At the trial, the plaintiff's proved the hand writing of the maker and endorsers; but did not prove any demand of the maker or notice to the endorsers, except the following, viz: That a letter had been deposited in the post office on the day the note became due, by a notary public, demanding payment of the maker, and at the same time letters were deposited in the post office for each of the defendants, informing them that the note was unpaid, and requiring immediate payment; but it did not appear that either of the said letters had ever been received by the defendants. The notary of the bank testified that it

HALLS, KIRKPATRICK, & Co. vs. HOWELL. SAME, vs. SAME. had been the practice of the bank, since its institution, to make demands in this way, where drawers did not reside in the town and had no agents there.

The testimony on the part of the plaintiffs closed here, and a motion was made for a non-suit, because there was not sufficient evidence of a demand and notice, and because declaration alleged notice to have been given on the day the note became due and the plaintiff failed to prove it. But the presiding judge overruled the motion, stating that as this was a note made for negotiation in this bank, the demand and notice were sufficiently proven. The defendant's attorney stated that he was prepared to prove that the maker lived within a few miles of Columbia, and that one, if not both of the defendants lived in Columbia, at the time the note became due; but on account of the above opinion of his honor, this evidence was not given.

The judge charged the jury that the evidence was sufficient to warrant a recovery; who accordingly found for the plaintiffs in both cases.

The defendant moved for a non-suit in both cases; because the plaintiffs did not prove any demand of payment on the maker of the note.

Chappell, for motion. On the subject of the necessity of demand and refusal, and notice to endorser, quoted 1 Con. Dec. 69, 70, and 2 M'Cord, 134.

Admitted that if a note be made payable at a particular place, it is sufficient to demand it there. But this note is not made payable at the bank: for aught that appears, it was not made with the intention of being discounted in bank. If the mere fact of the note's having got into the bank, is to dispense with the necessity of demand and notice, the exception that is contended for, may become universal, for every note may be lodged in bank.

The letter lodged in the post office by the notary, directed to the maker, was no demand, for it is clear that the demand must be personal. Nor if we admit a demand to have been made, was there legal notice to the endorsers. Notice must be given *after* demand and refusal: the letters making demand of

HALLS, KIRKPATRICK, & CO. vs. HOWELL. SAME, vs. SAME. the drawer and giving notice to the endorsers were lodged in the post office at the same time. We were prepared to prove that one of the defendants resided in the town of Columbia, and if so, it was necessary that the notice should be personal. *Chit. on Bills*, 236, n. The other lived in the country; but it is only where the party resides in a post town, that notice by post is sufficient. *Chit.* 235, 236. n.

Mc Cord and Preston, contra. It is admitted that if it be part of a negotiable contract, that payment shall be made at a particular place, it is unnecessary to make a demand elsewhere. But it is not necessary that the place should appear on the face of the contract, the appointment of a place may be shewn by parol. *Chit. on Bills*, 267, n. p. referring to 4 Johns. Rep. 285; 12 Mass. Rep. 172. "If the person at whose house the bill, &c. is made payable, be himself the holder of it, it is a sufficient demand of payment, for him to inspect his books, and sufficient evidence of a refusal, to find upon such inspection that he had no effects in his hands." *Chit.* 267.

Contracts may be either expressed or implied: it is implied as a part of the contract of endorsement, that the endorser of a note will pay, if demand be made of the drawer and he refuses. Is it implied here, that payment shall be made at the bank? Implication may be ascertained by circumstances, general understanding, notorious usage. In ordinary cases, it is sufficient to present for payment at the house or counting house of the drawer; the law implies that he contracted to pay there. Is the implication less strong that he who makes a note to be discounted in bank, contracts to pay in bank?

The established usages of the bank are presumed to be known to its customers, and the contract is made with reference to them. 5 Cranch, 52. The usage of the bank is the law of the transaction. The notorious usage of the bank was clearly proved "to make demand in no other way than by thus putting letters into the post office." The bank of the State is an institution not founded on strictly commercial principles, and the commercial rule must be relaxed, where it is physically impossible to conform to it. The customers of the bank are

HALLS, KIRKPATRICK, & Co. vs. HOWELL. SAME, vs. SAME. scattered over the whole state, and it would be next to an impossibility to make a personal demand on every one. The usage which it has adopted is not arbitrary, but founded on the necessity of the circumstances.

There was no evidence about the residence of the endorsers. Notice to them by post is in general sufficient: but the case went off on the other point.

The opinion of the court was delivered by Mr. Justice Huger.

It is not pretended that in an action against the endorser of a note, a demand on the drawer is not to be proved; but it is contended that as these notes were made to be discounted at the bank, a personal demand was unnecessary, and that a demand was to be implied from the non-payment of the notes. It is perhaps true that such notes, when discounted, are usually paid at the bank when due; but it is also true, that the banks in this state never neglect to make a demand on the drawers for payment. If therefore a demand in these cases be unnecessary, it is not because it is authorised by a well established and therefore well understood usage, but because it was the intention of the parties at the time of their execution, that the notes were to be paid at the bank. If a waiver of demand is to be implied from such intention, a demand will become unnecessary in most cases of discounted notes. But how is the fact? Is it understood by the parties to such notes that a demand is waived? If so, why do the banks always make a demand. They make a demand, I apprehend, not because it is understood a demand is waived, but because it is understood that it is not waived. If it be not so understood generally, I can perceive no reason for exempting the notes in question from the general rule. The motion must therefore be granted.

Nott, Colcock and Johnson, Justices, concurred.

Chappell, for motion.

Mr Cord & Preston, contra.

JEREMIAH HARMAN, vs. JOHN GARTMAN.

Defendant and one Lites, were tenants in common of a field. Lites, without the consent of defendant, leased the whole field to plaintiff, who planted it in corn; defendant entered and ploughed up part of the corn, on a portion of the field which he claimed to cultivate himself, by agreement with Lites. Held that plaintiff could not maintain action for this trespass. One tenant in common cannot maintain trespass against his co-tenant, without actual ouster.

This was an action of trespass, brought against the defendant, for ploughing up the plaintiff's land. It appeared that the defendant and one Lites were tenants in common of a tract of land in Lexington district. Defendant had cultivated the field in dispute for two years, immediately preceding the alleged trespass, which he had fenced and enclosed. The defendant and Lites had agreed verbally, one year previous to the alleged trespass, as to the proportion which each should cultivate. Lites then abandoned the cultivation, and agreed with defendant that he should cultivate the whole field. Afterwards Lites agreed verbally with plaintiff to lease to him the whole field, if defendant would agree to it; and Lites mentioned this to defendant, who did not consent thereto. Plaintiff however took possession of the whole field, consisting of five or six acres, and planted it without defendant's knowledge or consent. When defendant went to plant his crop, he found the land already planted; whereupon he ploughed up the corn which was upon that part of the ground which he himself had planted the year before; but did not touch that which was on the land that Lites had planted. For this alleged trespass, in ploughing up and planting the land, this action was brought.

The judge on circuit directed the jury to find for plaintiff, which was accordingly done. A motion was now made for a new trial, on the ground that an action of trespass could not be supported in this case.

Chappell, for motion. One joint tenant, or tenant in common, cannot maintain trespass against his co-tenant, unless there be an actual ouster; 2 *Blac. Com.* 182, 174; 8 *T. R.* 146. There was no ouster in this case. The defendant and Lites had agreed that each should cultivate a particular portion of the

HARMAN, vs. GARTMAN.

land, and the defendant only took possession of the part assigned to him, and did not interfere with Lites' portion. An ouster consists in denying the right of the tenant, and holding him out; a silent act, which gives the co-tenant no notice of an intention to hold exclusive possession, is not to be construed an ouster; *Coup.* 218; 5 *Wheat*, 124.

Bauskett, contra. The parties were seized *per me et per tout*, and either being in possession *actually*, of any part, is not liable to be interrupted in that possession by his co-tenant. The plaintiff's was *possessio pedis*, of the field in which the trespass was committed; the trespass was an actual ouster, and, therefore, good cause of action between tenants in common; *Run. on eject.* 192.

The opinion of the Court was delivered by Mr. Justice Huger.

The plaintiff's rights (if he had any,) to cultivate the field was derived from Lites; who could not give what he himself did not possess. If Lites therefore did not possess a right to exclude the defendant, the plaintiff could not. The defendant and Lites being tenants in common of the land, each was seized in the language of the law, *per me et per tout*, of the whole tract. Each had a right of entering and cultivating the whole; neither could exclude the other; for the power of so doing, would be inconsistent with their joint rights. Lites therefore could not have prevented the defendant from entering and ploughing the field. One tenant in common, for this reason, cannot sustain an action of trespass against another.

Had the plaintiff entered and cultivated the field, with the assent of defendant, as well as that of Lites, a different case would have been made. But so far was defendant from assenting to such an arrangement, that it appears he refused to concur in the proposal, and only ploughed the piece of land he had cultivated the year before. The motion must, therefore, be granted.

Nott and *Johnson*, Justices, concurred.

Gantt, Justice.—John Gartman, the defendant, and one Jacob Lites, were tenants in common of a tract of land lying in Lexington district. The defendant, Gartman, had occupied the

HARMAN, vs. GARTMAN.

land for two years; on the third year, Lites rented the field to the plaintiff, Harman; who repaired the fences, ploughed the land and planted it in corn. When the season was too far advanced to commence a new crop, the defendant went and ploughed up the corn, for which wrong this action was brought.

The ground relied on for a new trial is, because the verdict is contrary to law in this, that one joint tenant, or tenant in common cannot maintain trespass, *quare clausum fregit*, against his co-tenant, unless there has been an actual ouster. It is admitted that where there is an ouster, the converse of the rule holds good; that trespass may be maintained.

If this view of the law be correct, it would seem to follow, that under the circumstances of this case, the action was maintainable; because I can conceive of no disseisin more absolute than what took place on this occasion. The plaintiff, was in peaceable possession of the tenement, by an express contract of lease with one of the tenants in common, and by as clear and indubitable an implied assent on the part of the other; who although immediately in the neighborhood, did not interpose his equal right in opposition to the act of the other, but suffered the plaintiff to repair fences, plough and plant the corn, and after it was half made, went with high hand and forcibly destroyed the crop of the tenant. If this did not constitute an ouster or disseisin, then they are terms without meaning.

It would be an abuse of language and a waste of time to reason on the subject, for the purpose of shewing that here was a disseisin committed on the part of Gartman: then by the admission of the attorney for the defendant, trespass would lie. But suppose that even in case of ouster or disseisin, trespass cannot be maintained by a stranger, who comes in under a lease from one tenant in common, in which the other did not at the time actually join, so as to entitle the tenant to recover for the entire injury; still, it never was denied as law, but what a joint tenant might pass away his undivided interest or estate; consequently, the lease made by Lites to the plaintiff was good for his moiety in the land, and the right of the tenant for the year would be equal with that of the other tenant in common. Under such

HARTMAN, vs. GARTMAN.

circumstances, how was it competent for Gartman to exercise controul and ownership over the whole field? He forcibly took from the tenant so much corn as belonged to him, to wit, one half; and for this the action should have been maintained, although possibly he might not, under circumstances other than those which existed in this case, have recovered for the whole. If this be law, then the plaintiff is entitled to retain one half of the sum recovered, and a remittitur should be entered for the rest.

But I maintain with confidence, that according to the principles of the common law, Lites had a right to occupy the land by himself or his tenant for two years, the period for which Gartman had used it. Joint tenants stand upon an equal footing, and according to every rule of reciprocity, it was competent for Lites to hold and use the field for the same period that Gartman had held and used it. The latter had taken the profits for two years, and the former was entitled to take them for the same time; and this mode of exercising joint rights is recognized as a correct rule by elementary writers.

To show that the lease made by Lites was not void in law, but good for his part, I refer to *Littleton*, 286, "a joint tenant in fee makes a lease for years of the land, to begin presently or in futuro, and dies, it is a severance of the joint tenancy, and cannot be avoided by the survivor; because immediately by force of the lease, the lessee hath a right in the same land of all that to the lessor belongs."

"If one joint tenant in fee makes a lease for years, reserving a rent, and dieth, the survivor shall have the reversion but not the rent, because he claims by title paramount."

"If there be two joint tenants, and each make a several lease of the whole, their several moieties shall only pass by each lease." *Wil. part 1. fol. 1.*

I think therefore by the strictest principles of the common law, the lease was good for a moiety.

I think that the presiding judge did not err, when he held that under existing circumstances, this was to be considered as the lease of one tenant in common confirmed by the implied assent of the other; and whether this were so or not, that the lease was good for a moiety, and that the verdict should stand.

CANTRY, vs. DUBEN & BECKHAM.

But I think that by the principles of the common law, Lites was entitled to the exclusive use of the premises, the same period of time that Gartman had possessed, and therefore entitled to recover damages for the entire injury.

JAMES CANTEY, Sheriff of Kershaw, vs. THOMAS DUBEN & WILLIAM BECKMHAN

Assumpsit on an agreement not sealed, otherwise in the form of a bond for observing the rules, under the prison bounds act. Demurrer sustained; the security required by that act is a bond.

In this case an action of assumpsit was brought on an agreement which was drawn in the form of a bond; but which had no seal attached to it. It appeared that the plaintiff, as sheriff, had taken it as security for observing the rules, under the *prison bounds act*. The defendants filed a general demurrer, which was sustained by the circuit court; on the ground that the sheriff could not recover, as the instrument produced was not a bond. A motion was now submitted to reverse that decision.

Evans and Levy, for the motion. Argued that the prison bounds act only requires *satisfactory security* to be given for keeping the rules, without prescribing the form in which it shall be taken, and that all the purposes of the act may be answered by an agreement of this sort. The security required by the act is intended for the indemnity of the sheriff, unless as regards one particular provision; it directs that if a prisoner fail to give in his schedule, his *bond* shall be assigned. Such an agreement as this could not be assigned, and the act may have contemplated that the sheriff should always bring suit in his own name unless where a bond was given. But if this is not the security intended by the act, still it is a good and binding agreement. But for the act, it would not have been a good agreement; because the consideration, the suffering of the prisoner to go at large, would have been unlawful. This act permits and requires the sheriff to suffer the prisoner to go at

CANTY, vs. DUREN & BECKHAM.

large, to a certain extent, and makes it a good consideration for the agreement to indemnify him.

Miller, contra. The whole act must be construed together, and from the whole, it is apparent that a bond was the security contemplated. The act permits the prisoner to go at large, only on the condition of giving the security which it prescribes. It is still unlawful for the sheriff to suffer him to be at large upon any other condition or security. It would be dangerous to construe the act so loosely; the sheriff might, with the same reason, rely on a mere verbal promise to observe the bounds.

The opinion of the court was delivered by Mr. Justice Huger.

Although the second and third clauses of the prison bounds act only require the sheriff to take satisfactory security, yet what was regarded by the legislature as satisfactory security, is plainly intimated in the 7th. clause. The words are 'any prisoner committed on execution as aforesaid, who shall not give in such schedule agreeable to the tenor of his bond', shall not be any longer entitled to the benefit of the rules.

That the prisoner in execution is not entitled to the benefit of the rules without having given a bond, is not only a plain implication from the words of the clause, but such has been the construction given to the act (as far as we can ascertain from the practice under it) ever since its date in 1788. A practice so old should not be lightly disturbed, the more especially as such a practice appears essential to the accomplishment of one of the objects of the act; which is to secure to the plaintiff, a right to the assignment of the bond; should the prisoner not comply with the requisition of the act. The words are "that the (prisoner's) bond shall be forfeited and assigned to the plaintiff. "If the prisoner be only entitled to the rules on his giving bond, the sheriff could have no right to discharge him without a bond. If he discharge him when he has no right to do so, it is an escape, for which the sheriff is responsible; as such an escape is illegal, it can furnish no consideration on which a contract can be supported. The motion must therefore be refused.

Nott, Colcock and Johnson, Justices, concurred.

130 SOUTH-CAROLINA STATE REPORTS,

WM. ELLISON, vs. ELIZABETH GORDON. THE SAME, vs. THE SAME, as Ex'rs.

Proceedings in attachment. After pleading to issue and cases called for trial, defendant moved to strike them from the docket, because declarations were filed more than two months after the return of the writs. Motion came too late; the irregularity, if any, was waived by pleading.

Writs of attachment were issued by the plaintiff against the defendant, on the 12th June, 1823, returnable to the following October Court, when appearances were entered. On the 28th of the November following, declarations were filed, orders for judgment, for want of pleas, were obtained, and the cases put on the writ of enquiry docket. On the first day of the court following the orders, the defendant moved to have them set aside, and for leave, on pleading the general issues to, transfer the cases to the issue docket. This motion prevailed, and the cases were accordingly put on the issue docket. When afterwards called for trial, the defendant's attorney moved to have them struck from the docket, as the declarations had not been filed within two months after the return of the writs. This motion was granted by the circuit court. A motion was now submitted to this court, to reverse that decision.

The opinion of the court was delivered by Mr. Justice Pluger.

It is unnecessary to enquire whether the declarations were filed within the time prescribed by the act. The defendant, by pleading, had waived his objections to the irregularity, if one existed. Had he refused to plead when he did, an application might have been made by the plaintiff for further time to declare; which would have been granted under the existing circumstances of this case. The motion in this case must therefore prevail.

Nott, Colcock, and Johnson, Justices, concurred.

Simkins and Ford, for motion.

———, contra.

CHRISTOPHER DEGRAFFINREID, vs. DANIEL A. MITCHELL.

Trespass laid in the declaration, on a day previous to that on which it was proved, both being before the issuing of the writ; no cause for nonsuit.

This was an action of trespass. The injury complained of was proved to have been committed in February, 1820; but was laid in the declaration, as done on the first day of January, 1820. The writ issued after February. The plaintiff was nonsuited.

The plaintiff now moved to set aside the nonsuit, on the ground that the allegation of the time of committing an injury, *ex delicto*, is immaterial, and that it may be proved to have been committed on a day anterior or subsequent to that laid in declaration.

The opinion of the court was delivered by Mr. Justice Huger.

The day when the injury complained of was done, provided it was done before action brought, is not material, unless made so by the pleadings. In this case, the issue made, involved only the right of property, and the day laid in the declaration, as well as that proved, was anterior to the commencement of the action. *Chitty's Pleadings*, 258, 394, 304; *10th Johnson*, 416; *7th Johnson*, 321. The motion must therefore be granted.

Colcock, Gantt, and Johnson, Justices, concurred.

Williams, for motion.

Herndon, contra.

JAMES WILSON, Assignee, vs. ALEXANDER MILLER.

Defendant, by his assignment of a sealed note, engaged "if not good, to make it good;" after judgment against the obligor and fi. fa. returned nulla bona, it was held that other evidence than the return of a ca. sa. was sufficient to establish the fact of the obligor's insolvency.

This was a summary process, brought on the following assignment of a single bill or sealed note, given by William Kerr to Alexander Miller, the defendant, "May the 9th, 1822, for value received." "I indorse the within note to James Wilson, which note if not good I promise to make good." Signed, "A. Miller." The plaintiff had sued William Kerr, the obligor of the

ATTAWAY, *ads.* JAMES.

sealed note, recovered a judgment, and had a fi. fa. issued, on which there was a return of nulla bona. No ca. sa. was issued, but the plaintiff offered other evidence to show that the defendant was insolvent. The circuit judge was of opinion that a ca. sa. was necessary, and gave a decree for the defendant. From this decree the plaintiff appealed, and moved for a new trial, on the ground that other evidence than a ca. sa. can support the charge of insolvency.

The opinion of the court was delivered by Mr. Justice Huger.

In the case of *Eddings and Glasscock*; 1 N. and M. C 295, it was only decided that a nulla bona was not sufficient to establish the insolvency of the defendant. It has never been ruled that a ca. sa. with a return of *non est inventus*, was necessary to prove insolvency. In all cases satisfactory proof must be adduced; but other proof than a ca. sa. may be sufficient to establish the insolvency. A new trial is therefore granted.

Nott, Johnson, Colcock and Richardson, Justices, concurred.

JOHN ATTAWAY, *ads.* JOHN S. JAMES, *Admr. of Wm. Dendy.*
One I. A. the brother of defendant, placed in his hand funds for settling his (I. A.'s) debts on the best terms he could: defendant called on plaintiff, to whom I. A. owed \$65, and representing the debt as doubtful, obtained a discharge on paying \$33: Held no ground to charge defendant, who only acted as agent, with the balance of the debt.

ISAAC ATTAWAY, the brother of the defendant, was indebted to Wm. Dendy, the plaintiff's intestate, in the sum of \$65 6¼ by book account. After contracting the account, he removed to the state of Alabama, where he resided one or two years. Having returned to this state, he deposited some money in the hands of his brother, the defendant, for the purpose of settling his debts, on the best terms he could. The defendant called on the plaintiff and representing the debt as being doubtful, succeeded in getting it settled, and obtained a discharge for the sum of \$33.

STEPHENS, vs. LIGON.

The plaintiff brought this action against him, for fraudulently representing the debt as doubtful, when he in fact had in his hands at the time, funds of Isaac Attaway sufficient to pay the whole demand. Defendant proved by Isaac Attaway himself, who had remained in this county ever since, that defendant acted merely as his agent; that he kept no part of the money himself, but returned to him (Isaac Attaway) all that remained after discharging his debts, within a few days after he settled with plaintiff. The presiding judge gave a decree for the plaintiff for \$32, with interest from — February, 1824, the time of the settlement.

The defendant moved the constitutional court to reverse this decree, on the following grounds:

1st. Because under the circumstances, the defendant John Attaway, acting merely as the agent of his brother, is not liable

2nd. Because the defendant, if liable for the balance of principal, ought not to be charged with interest.

The opinion of the Court was delivered by Mr. Justice Richardson.

Throughout the transaction, the defendant acted as the agent of Isaac Attaway, in order to settle his debts in the best way he could; and although the plaintiff may, on account of the misrepresentation made by the agent, if any there was, still recover the balance of his debt against Isaac Attaway, yet there is no sufficient ground for substituting the agent for the principal and making him the debtor, when he has received nothing from either party; but simply executed his commission in paying as he had been directed. The motion is therefore granted.

Colcock, Nott, Huger and Johnson, Justices, concurred.

ANDREW STEPHENS, vs. ROBERT LIGON.

When a statute gives double costs, the rule of taxation is to allow, first, common costs and then add one half of that amount.

In this case, plaintiff Stephens, had brought an action of trespass and false imprisonment against the defendant, in his capacity of a justice of the peace. On the trial of the cause,

STEVENS, vs, LIGON.

the verdict was for the *defendant*; who entered up his judgment for double costs, and issued execution thereon. In taxing the costs, the clerk adhered to the English rule, and for double costs, allowed only fifty per cent to be added to the usual costs. A motion was made before the circuit court, to open the judgment, and alter the taxation of costs, by adding one hundred, instead of fifty per cent upon the usual costs; which motion was granted. The plaintiff now moved to have the decision of the judge reversed, on the following ground: that the taxation of costs, as made by the clerk in the first place, was the correct mode of taxing double costs, and that the alteration ordered to be made, by adding *one hundred* instead of *fifty* per cent to the ordinary costs, was contrary to law.

The opinion of the court was delivered by Mr. Justice Richardson.

"Where a statute gives double costs," says *Bacon*, (2 vol. *Tit. costs*, C.) they are calculated thus:—1st, The common costs, and then half the common costs. 2nd, If treble costs. 1st, The common costs, then half of these, and then half of the latter." *Jacobs in the Law Dictionary*; *Tit. costs*, and *Tidd's practice*, 962 and 3, lay down the same rule; which is supported by the original authorities. See *2nd Stra.* 1048. *Smith, vs. Dunc.* And as no inverte practice has existed in this state to contravene the rule laid down, it is considered as the just and legal principle, and our acts must have been passed with reference to a principle so fully established. The motion is therefore granted.

Colcock, Nott, Huger, and Johnson, Justices, concurred.

Goldthwaite, for motion.

A. W. Thompson, contra.

JAMES BARKLEY, JR. *ads.* HUGH BARKLEY.

Land was sold by the sheriff, by order of court, to effect a partition; held, that in an action on the bond given for the purchase money, the purchaser might set up by way of discount, a deficiency of the quantity which the land had been represented to contain.

ROBERT BARKLEY, who had become by purchase interested in a certain tract of land, of which John Miller deceased died seised, instituted in the court of common pleas for Fairfield; proceedings in partition against Jane Miller, widow of said John Miller and some of his heirs at law, to divide the same. On the return of the writ of partition, the plaintiff, as sheriff of the district, was directed by order of the court, to sell the said tract of land at auction, for the benefit of the persons interested, on a credit of 12 months. On the first Monday in January, 1820, plaintiff offered said tract of land for sale, and the defendant became the purchaser at six dollars per acre. The land was represented to contain four hundred acres, in conformity to the quantity set forth in the proceedings in partition, and platt thereunto annexed. After the sale, the defendant gave his bond for the purchase money, deducting the costs of suit, which he paid down. After the sale, defendant acquired by purchase the interest of six shares in the said bond, leaving only the widow's share and one of the heirs unsatisfied; and before the commencement of this action, paid these claimants their respective shares, after deducting their proportion of a certain quantity of land taken from defendant's purchase by elder grants.

John Hollis, the real plaintiff in this action, purchased one share from one of the heirs of John Miller, and caused this action to be brought against defendant on his bond, in order to recover the amount of said share. Defendant pleaded *non est factum* and *payment*, and gave notice of a discount of 55 acres of land, taken from the tract of land by older grants. On the trial of the case, defendant offered to prove his discount; also, that he had fully satisfied six of the heirs of the said John Miller, for their interest in said bond; and that he had fully paid up, before the commencement of this action, the widow and other heir's interested in said bond, deducting their proportion of the

BARKLEY, *ads.* BARKLEY.

quantity of land taken off by older grants. The presiding judge however refused to permit the defendant to go into evidence of his discount, on the ground that as the defendant purchased at sheriff's sale, the parties interested in the bond were not bound by the sheriff's representations made at the sale, and that the rule of *caveat emptor* was a bar to such a defence.

The jury found a verdict for the plaintiffs for the sum of \$, the amount of Hollis' claim.

The defendant moved the constitutional court for a new trial, upon the ground, that the court refused to permit the defendant to give in evidence, under his notice of discount, the deficiency in quantity of the land purchased.

The opinion of the court was delivered by Mr. Justice Richardson.

In this case, the sheriff had sold the land as the mere agent of the parties concerned in the distribution of the estate; and the purchaser stood upon the footing of other purchasers in general, and not in the situation of purchasers at sheriff's sale. In this instance, the sheriff sold the land for the distributees, without knowledge of the premises, as an auctioneer or other agent would have done; and the purchaser has the same rights that he would have had in purchasing directly from the heirs at law. But comment is unnecessary, as the case is completely within the principle decided in the case of *Tunno, vs. Fludd*; 1 M C. 121. In that case, Fludd purchased from the commissioner in equity, selling for certain parties interested in the land; and the court held that any deficiency in the quantity of the land might be given in evidence by way of discount against the amount of purchase money. The motion is therefore granted.

*Johnson, Colcock, and Gantt, Justices, concurred,
Clarke, for motion.*

Pearson, and Nott, contra.

CHARLES DEGRAFFINREID, vs. ISAAC GREGORY.

Defendant first surveyed the land in dispute and within six months obtained a grant. Plaintiff afterwards surveyed the same land, and within six months from the date of defendant's survey, took out a grant which was prior in date to defendant's: held that plaintiff's grant was null and void.

THIS was an action of trespass to try titles. The plaintiff's grant to the land in dispute was prior in date to defendant's. On the part of defendant it was contended however that plaintiff's grant was void; in as much as defendant had first surveyed the land, with the intention of obtaining a grant. Plaintiff subsequently obtained a survey, and within six months from the date of defendant's survey, took out a grant. Defendant's grant was also within six months from the date of his survey. The circuit court held plaintiff's grant to be void and ordered a nonsuit.

From this order the plaintiff appealed on the grounds:

1st, That the court had not jurisdiction of the question, as to the validity of plaintiff's grant, as that question could be tried legally only before the court of caveats.

2nd, Because the plaintiff's grant, admitting the court had jurisdiction of the question, was and is a legal and valid grant.

The opinion of the court was delivered by Mr. Justice Richardson.

There can be no doubt of the first general proposition laid down by the plaintiff's counsel, that this court will not question the validity of a grant of land, which appears regular and legal upon the face of it. This principle was established in the case of *Mounce, vs. Ingram*; 2d Bay, 454, and has been often recognized since.

But the case before us depends upon the act of 1765, P. L. 400, forming an exception to the general rule, and rendering certain grants, although issued and apparently regular, yet null and void, by reason of certain matter extrinsic to the grant.

The act is in the following terms:—"That a person making a survey of land, shall be allowed six months from the time of making such survey, to obtain a grant for the said land, and

DEGRAFFINREID, vs. GREGORY.

in default of obtaining a grant within that time, any person may at the expiration thereof, apply for, and shall obtain a grant for the said land, on paying for it; and any grant obtained for land within six months from the time of its being surveyed, (except by the person for whom it was surveyed,) shall be *ipso facto* null and void."

The language of the act is full and explicit. Every person after making a survey of vacant land, is allowed six months to take out his grant, and any grant obtained within six months by another person for the land surveyed by the former, is *ipso facto* null and void. The act supposes a grant actually issued, and does not confine it to a grant obtained upon the same survey, as argued by the counsel; but renders any grant obtained, except by the person first surveying, null and void.

The reason of such exclusive right to the party first surveying is plain:—1st, He is allowed six months to pay the purchase money, and as the six months are allowed from the time of "making the survey" and not from the time of the return of the plat to the locator's or secretary's office, it was foreseen, that another person might in the meantime take out a grant, without its being known to the party first surveying; it became therefore necessary to render such grant, although actually issued, *ipso facto*, null and void.

This court therefore, without infracting the general proposition laid down by the plaintiff's counsel or intrenching upon the exclusive jurisdiction of the court of caveats, must, under the express enactment of the act, hold the plaintiff's grant null and void; or the act would be rendered practically inadequate to the purpose for which it was enacted; which is to give to the party first surveying the land, the exclusive right of preemption for six months.

This construction too has been repeatedly made in practice on the circuits: And the motion is refused.

Colcock, Huger and Johnson, Justices, concurred.

A. W. Thompson, for motion.

Farrand's, contra.

ALEXANDER MARTIN, vs. MITCHELL & DAVIS.

For defect in the declaration, the Circuit Court ordered Plaintiff to be non-suited or pay the costs: Plaintiff went to trial, but gave notice of an appeal from the order directing him to pay costs: Appeal dismissed; the circuit court might make the order on such condition, and plaintiff accepted the terms by going to trial.

THIS was an action of assumpsit on a note of hand. The declaration alledged that the defendants promised to pay \$ 100 75, the amount of the note, when requested, according to the tenor of the note, without specifying the day the note became due.

The defendants had pleaded the general issue and also wished to rely on the plea of tender, which had not been pleaded. Plaintiff permitted defendants to take the benefit of the pleas of tender and went on to trial, under the expectation that the case was to be tried on its merits; but after plaintiff had closed his evidence, defendants attorney moved for a non-suit, for the above mentioned supposed defect in the declaration, and the court ordered a non-suit, unless plaintiff would go on to trial on terms of paying all costs. Plaintiff then gave notice that he would appeal from the order of the Court requiring him to pay costs, but went on to trial and took a verdict. He now moved to reverse the order of the Court:

1st. Because the note offered in evidence was sufficient to support plaintiff's declaration.

2d. Because defendants ought not, under the circumstances of the case, to have been permitted to take any exception to the plaintiffs record, as the plaintiff permitted him to put in the plea of tender, under the belief that the case was to have been tried on its merits.

3d. Because the court ought not to have compelled the plaintiff to pay more than the cost of present term, in any view of the case.

4th. Because the court ought to have permitted plaintiff to amend without paying any cost.

The opinion of the court was delivered by Mr. Justice Richardson,

MARTIN, *vs.* MITCHELL, & DAVIS.

Whether the reasons for a non-suit were sufficient, is not now for the consideration of this Court, but whether the court had the power to order a non-suit unless the plaintiff would pay the costs, is the true question.

The plaintiff accepted of the terms offered by the court, reserving the right to inquire into the power of the court to order a non-suit nisi, and must be bound by his acceptance, if the court was competent to annex such a condition precedent to the restoration of the case to the docket.

No doubt can be entertained of the power of the court to annex the condition, and order the non-suit, nisi; at least since the case of *Steen, vs. Drake and Cavanah*, 2 Bay, 431. In that case, the court ordered the cause to stand over and the plaintiff's to pay the costs within thirty days, or be non-suited. The costs not being paid within the thirty days, judgment of non-suit was signed.—And upon an appeal to this court, all the judges held the non-suit properly ordered; and took the occasion to lay down the rule, how costs ordered in a cause in transitu, are to be paid which may be seen by referring to that adjudication. But independently of this decision, if the plaintiff were to succeed in setting aside the condition of his paying the costs or being non-suited, it would follow that the non-suit must be entered up; in which event he would be obliged to pay the costs, and the verdict of course be set aside. The motion is dismissed.

Johnson, Colcock and Nott, Justices, concurred.

A. W. Thompson, for motion.

Herndon, contra.

WILLARD WATSON, vs. JAMES WILLIAMS.

Trespass for the taking of a slave: defendant justified as having the right of property, and offered in evidence a letter written by a former owner of the slave, acknowledging that he had sold to defendant. Held that the letter was incompetent, as the declaration of a third person, between whom and plaintiff there was no privity.

THIS was an action of trespass. The plaintiff proved that he had been in possession of a negro man called Jim, and that on the of May, 1822, about 10 o'clock at night, the defendant entered the plaintiff's house and took him away. The plaintiff laid claim to Jim and warned defendant not to take him.

Defendant set up on the trial a title to the negro. For this purpose, he proved a bill of sale for a negro called Jim, from Wm. Shaw to Wm. Smith, dated 1814.

The defendant next produced a bill of sale from Wm. Smith to defendant, dated May 13th 1822, the day of the night upon which he committed the trespass. There was a subscribing witness to this bill of sale, who not being produced, the court supported an objection on the part of the plaintiff, to its being proved by any one else.

Defendant then proved the signature of a letter from Wm. Smith to himself, dated January 23, 1823, after the commencement of this action. This letter was written to defendant, in answer to one he had written to Smith, informing him that this action had been brought against him, and requiring him to support his title. Smith in his answer promises to pay the costs, and goes on to say he had sold the negro to defendant.

Objections were taken to this letter's being received in evidence; that the defendant had shown a bill of sale from Smith, and could not now resort to inferior testimony to establish his right; that Smith's declarations or letter were no evidence; that these shewed him to be interested in the event of the case; that the declarations contained in the letter, being made after the action was brought, could not be given in evidence to shew a title in defendant, at the time the trespass was committed, and that in fact, the letter did not shew whether defendant had

WATSON, vs. WILLIAMS.

brought after or before the trespass. The objections were overruled by the court and the letter admitted in testimony.

Defendant then also went on to shew that plaintiff's possession of Jim was under a loan from Smith, made in 1815, and plaintiff in reply produced evidence which he relied on to shew that it was under an absolute gift; plaintiff's wife was the sister of Smith, and it was in consideration of that connexion that Jim had been given.

The jury found a verdict for defendant. The plaintiff appealed principally on the grounds of objection taken to Smith's letter.

Johnson, for motion, argued that Smith's letter to the defendant was incompetent testimony to shew the sale, as defendant had shewn that there existed higher testimony of the fact—the bill of sale. The rule which requires the production of the subscribing witness, is not merely that there may be the most satisfactory proof that the instrument was executed; the party to be affected has a right to the evidence of the witness as to the circumstances under which it was executed. The witness if produced, might have proved fraud in obtaining the bill of sale; he might have proved a defeazance entered into at the same time. But the letter was at most only the declarations of Smith, and no evidence against plaintiff; between whom and Smith there was no privity. The competency of testimony is to be judged of when it is offered. When this was offered, the plaintiff had set up no claim under Smith: he had relied on his possession alone; and if it was proved that the property was formerly Smith's, the legal presumption was that he had purchased of Smith. Could Smith's declarations be received to rebut such evidence of title? But he could not have been sworn as a witness if he had been present. The letter itself shews him to be interested in the event of the suit and answerable to Williams, if he should fail. If it is competent however, as Smith's acknowledgment of having sold, it does not shew that the sale was made before the trespass committed; and ambiguous testimony is to be taken most strongly

WATSON, vs. WILLIAMS.

against him who produces it. Cited *Phil. Ev.* 173, 4; *id.* 176, 184; 2 *M' Cord*, 214; 1 *Johns.* 159; 5 *Johns.* 112.

Bauskett, contra. There can be no doubt that plaintiff derived whatever claim he had to the property, from Smith. And there is as little doubt that the negro first went into his possession as a loan. He offered no proof of a subsequent gift, but presumption, arising from the length of time the negro was allowed to remain in his possession. Such presumption however cannot arise; he who relies on a gift must prove it; it is not like the case of a parent permitting property to go into the possession of a child, where a gift is presumed from the obligation of a parent to provide for the child. No such inference is to be made from the relation of brother and sister. There was sufficient proof of property in Smith, if not of a transfer to defendant. But a trespass may justify under an authority from the owner of the property; and the letter shews ample authority to take possession of the negro, if not evidence of a sale. Smith would not have been a competent witness, to prove that he had not given the negro to plaintiff, but he might have testified that he had authorized defendant to take him.

The opinion of the court was delivered by Mr. Justice Richardson.

The only question necessary to be considered is, whether the letter written by Smith after the commencement of the action, is competent testimony, to shew a title to the negro in the defendant. In order to decide this question, it is first to be observed that the plaintiff had deduced no title from Smith; he and Smith were therefore strangers, and it followed of course, that any evidence given by Smith must be upon oath or adduced in open court, like the evidence of other witnesses.

But in answer to this view, it may be urged that the letter of Smith may be considered a bill of sale and merely evidence of a transfer of his property in the negro to the defendant, and assuredly, it would be legal testimony against Smith for that purpose.

MITCHELL, vs. DEGRAFFENREID & MOORMAN.

But as against a stranger, it can be no more than an *ex-parte* declaration made by Smith of what he had done; and viewing him as a witness, he ought to be sworn in open court. Even as a deed of confirmation, being made subsequent to the commencement of the action, it could not prove a title in the defendant at the time of the trespass committed. But I can perceive in the letter nothing more than a piece of *ex-parte* evidence, calculated to support the defendant's title; to do which Smith was interested, and he might as well have been brought into open court to sign certificates, as the exigencies of the defence should require successive expedients.

The case appears to me to come within the principle established by the case of *Martin, vs. Lightner*, 2 N. C. 214, that the declarations of the payee of a note, which he had transferred, were inadmissible. The motion is therefore granted, *Johnson, Colcock, and Nott*, Justices, concurred.

O'Neal, and *Johnson*, for motion.

Bauskett, and *Dunlap*, contra.

D. A. MITCHELL, vs. CHR. DEGRAFFENREID, and JAMES MOORMAN.

Defendant covenanted to deliver certain slaves when demanded.

On non est factum pleaded to an action brought, it was held that the failure to prove a demand was no ground for non-suit, and that defendant could not give evidence of performance. In covenant, the plaintiff is not required nor the defendant allowed to give evidence of any thing that is not put in issue by the plea.

THIS was an action of covenant, on an instrument of writing by which the defendant had undertaken to deliver to the plaintiff, as sheriff of Union district, a certain number of negroes, specifically named, whenever they should be called for. The plaintiff averred in his declaration that they had been demanded, and that the defendants had refused to deliver them according to the covenant. The defendants pleaded *non est factum*. The plaintiff proved the deed and the value of the

MITCHELL, vs. DEGRAFFENREID & MOORMAN.

negroes, and submitted his case to the jury. The defendant moved for a non-suit on the ground that plaintiff had not proved a demand. The court overruled the motion. They then offered to go into evidence of performance; that also was refused by the court.

The jury found a verdict for the plaintiff, and this was a motion for a new trial on several grounds; of which only those above mentioned were thought to require consideration.

The opinion of the court was delivered by Mr. Justice Nott.

All the grounds made in this case may be resolved into the general question, whether in an action of covenant, the defendant can require the plaintiff or be allowed himself, to give in evidence any matter not put in issue by his plea. But if the books of the highest authority are to be regarded, there can be no doubt on that subject. In *Chitty's pleadings*, it is laid down that "in covenant there is no general issue; for the plea of non est factum, only puts the deed in issue, and not the breach of covenant or *any other* matter of defence." The defendant therefore, must plead specially every matter which it would be necessary to plead in debt on bond or other specialty, as that the deed was voidable by infancy, or illegality of consideration. The defendant must also plead specially, performance of the covenant, or excuse of performance, as by eviction or *non performance* of a condition precedent by the plaintiff: 1 *Chitty's Pleadings*, 482-3; 2d Do. 544, n. So where the covenant requires that the plaintiff should have made a previous demand, the defendant must take advantage of the want of demand, by pleading specially that he always was and still is ready to perform: 6 *Viner*, 389. The object of the pleadings is to give each party a distinct knowledge of the question which he is required to support or defend. A defendant has always an opportunity of choosing the ground on which to rest his defence. He may even have the benefit of several, by putting them in issue by his pleas, but he is not allowed to put one in issue and give evidence of another.

It has been contended that as the plaintiff was under the necessity of going into evidence dehors the record, to prove the

HUNTINGTONS, vs. SHULTZ & M'KENNA.

amount of damages which he had sustained, the defendants might go into evidence of performance, by way of mitigation. But the distinction between giving evidence in mitigation and justification is as obvious as the distinction between denying a fact and justifying it by plea.

The defendant may give any evidence in mitigation which is a direct answer to the testimony offered by the plaintiff; but he can not be permitted to give evidence directly at variance with the matter put in issue by his plea. Such a practice would go to destroy all the rules of pleading. The motion therefore must be refused.

Gantt, Johnson, and Huger, Justices, concurred.

Williams, for motion.

A. W. Thompson, contra.

X A. J. & G. W. HUNTINGTON, vs. HENRY SHULTZ & M'KENNA.

The service of a writ of capias ad respondendum, by delivering a copy, is not an arrest, within the meaning of the act of 1791, exempting from arrest persons necessarily attending on courts.

A writ of capias ad respondendum was issued against the defendants, returnable to March term, 1824, which was personally served upon one of them (Henry Shultz) during his attendance as a party to a suit in the court of equity, at February term, 1824. There was no affidavit to hold to bail. Henry Shultz, at March term, moved to set aside the service of the writ, on the ground that he was privileged from the service of this writ during his attendance on the court. The court granted the motion. The plaintiff appealed from this order on the following grounds:

1st. That the privilege claimed by the defendant applies only to cases where bail is required, and where the body is liable to be taken into custody; and not to cases where the writ is served by delivering a copy to defendant, with notice to appear, and where there is no arrest:

HUNTINGTONS, vs. SHULTZ & M'KENNA.

2d. That even if a defendant be privileged in such cases, while attending a court of law, the same privilege does not extend to parties attending the courts of equity.

The opinion of the Court was delivered by Mr. Justice Richardson.

The question in this case depends upon the act of 1791; 1 *Faust*, 44; 1 *Brevard*, 223; which enacts that "all persons necessarily going to, attending on, or returning from the same," (referring to the superior courts) "shall be freed from arrests in any civil action."

Now what does the term "arrest" mean? *Wood* (see *Institutes*, 595) defines it "a detention of the person": and *Blackstone*, (3 vol. p. 288) says "an arrest must be by corporal seizing the defendant's body; after which the sheriff may justify breaking open the house, in order to take him;" and in p. 289, he says "when the defendant is arrested, he must either go to prison or put in special bail to the sheriff."

These authorities show that an arrest is synonymous with actual detention of the person of the party arrested; and does not mean merely a summons or citation.

The scope and object of the act of 1791 too, evidently require no more than that the person of the party attending court shall be free from detention; and he may be *cited* or *summoned* without any detention of his person. *Blackstone* gives an apt illustration of the distinction, when he says (p. 288,) &c. "that in the civil law, for the most part, not so much as a common citation or summons, much less an arrest, can be exercised upon a man within his own walls."

And our act of 1794, exempting militia men, when at muster, from the service of any writ, equally points out the same distinction. The motion is granted.

Johnson, Huger, and Colcock, Justices, concurred.

JOHN S. BRATTON, vs. JAMES CLENDENIN.

Witness attending court, served with a subpoena ticket, no writ of subpoena having issued, is entitled to no more than 2s. 4d. per day.

In the above case, George Dale had attended court as a witness for the plaintiff, being served with a subpoena ticket, but no subpoena writ having issued. The clerk taxed his attendance as if he had been subpoenaed. But the court on an appeal from the taxation, ordered the costs stricken out, because no writ had been issued.

Plaintiff appealed and moved to reverse the order, on the ground, that as the witness attended on the subpoena ticket, his cost ought to have been taxed against defendant, notwithstanding no subpoena writ had been issued.

The opinion of the court was delivered by Mr. Justice Richardson.

By the act of 1791, every witness is allowed 4s. 8d. per day, if from a distance; and but 2s. 4d. if a resident in the town where the court is holden; and it has been long the practice to allow any witness who is called upon without having been regularly subpoenaed, but 2s. 4d. placing him upon a footing with residents of the place.

A subpoena ticket carries no authority, but is a mere request made to the witness to attend court. His costs therefore can be taxed at most at no more than 2s. 4d. And the motion is dismissed.

*Colcock, Huger, Gantt, and Johnson, Justices, concurred.
Williams, for motion. Clendenin, contra.*

JAMES MARTIN, vs. HUGH SIMPSON.

In closing the line of a tract of land, which calls for an open corner, the line of another tract, which is called for as a boundary, should be pursued as far as it extends, though deviating from the course; when that fails the course should be pursued: course and distance should govern, unless controuled by natural objects or artificial boundaries.

THIS was an action of trespass, to try the title of a tract of land in Chester district. The defendant, Simpson, having

MARTIN, vs. SIMPSON.

produced a regular chain of title, derived from an older grant than that of the plaintiff, Martin, was entitled to a verdict; but in what manner his survey ought to have been closed, was the question. It appears by the platt (attached to the grant under which defendant claims,) that his south eastern corner was open; which corner is designated in the following diagram, by the letter E. The line on the eastern side of the tract is represented in the platt as running S. 35, W. but the tract calls for *M'Cown's* land on that side, the boundary line of which runs S. 20, W. as far as down the line C. D. The dotted line D. F. is a prolongation of C. D. until it intersects with the line A. E. G. F. The line D. G. runs in the course called for in the grant, viz:—S. 35, W. from the point D. where *M'Cown's* line stops.

The jury, as they were instructed by the circuit court, closed the survey at F. and from this decision, an appeal is now submitted to this court.

The opinion of the court was delivered by Mr. Justice Huger.

It is important to the quiet enjoyment of landed property, that the rules by which it is to be located should be simple and few. If a case therefore can be as well decided by an already well known and established rule, it is better to be satisfied with it, than to make a new one, or resort to another not so well known. It has already been well settled that courses and distances must govern, unless controuled by artificial boundaries or natural objects. Having arrived therefore at the corner C. the surveyor should have proceeded on the dotted line C. E. (the course called for in the grant,) had he not been prevented by the call for *M'Cown's* line, which runs in the direction or course of C. D. F. As soon however as he arrived at D. the termination of *M'Cown's* line, the reason for leaving the course called for by the grant, ceased, and he should then have returned to the course. Every link he ran on D. F. was unauthorised by the grant—it was neither the course or *M'Cown's* line. From the termination of *M'Cown's* line at D. he ought to have proceeded in the direction of D. G. (the course called for by

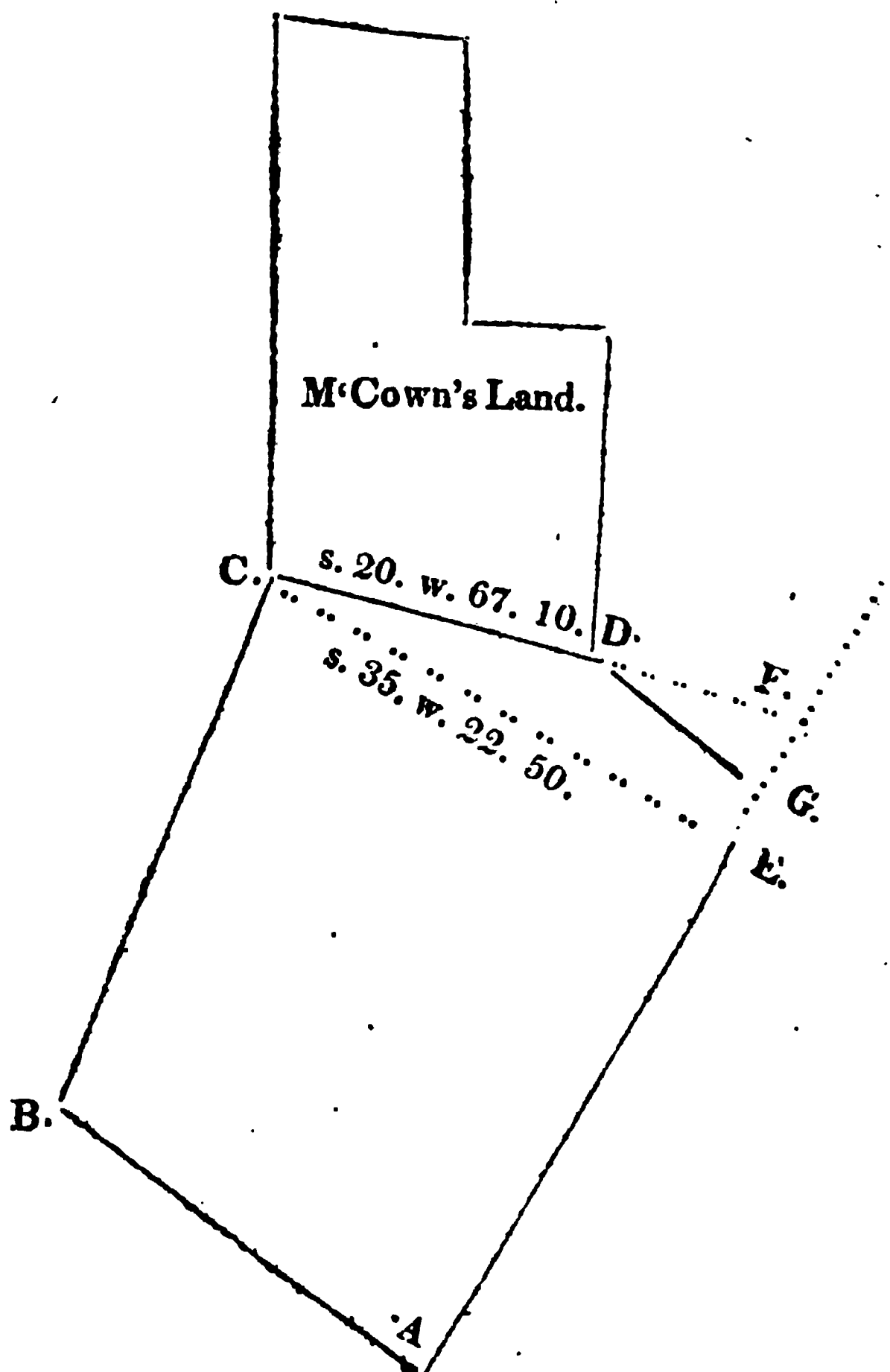
MARTIN, vs. SIMPSON.

the grant) which fixes the corner at G. The motion in this case must therefore be granted.

Colcock, and *Johnson*, Justices, concurred.

Clarke, for motion.

Eaves, contra.



JOHN G. GUIGNARD, vs. JOHN GLOVER.

Execution renewed after the expiration of the year and day, by the consent of defendant, the judgment not having been revived by seire facias, is not irregular.

Third persons cannot take advantage of irregularities.

TRESPASS to try title. Both plaintiff and defendant derived their claims to the land in dispute through Needham Davis. The plaintiff under a judgment, at the suit of Ainsley Hall against Needham Davis, of the date 30th March, 1818; and the sheriff's sale under fi. fa. for satisfaction of that judgment, of the third of June, 1822.

The defendant's title rested on a conveyance from Needham Davis to John W. Wilkins, dated 19th September, 1818; a judgment at the suit of Benedict and Clark, against David Becket and John W. Wilkins, of the 13th of May, 1820; a judgment of E. L. Miller against Becket and Wilkins of the 25th of November, 1819, and a sale under executions, for satisfaction of these judgments, to the defendant, 1st January, 1821.

It was admitted on the part of plaintiff that the defendant, Glover, attended on the day of sale, stated his claim and forbid the sale.

As the conveyance from Davis to Wilkins was made after the lien of Hall's judgment attached, the plaintiff's title appeared to be preferable. But the defendant attempted to shew that the sale under Hall's execution was void; first, because the judgment was satisfied, and secondly, because the execution was irregular.

To shew the judgment satisfied, he offered in evidence certain articles of agreement between William Hall, acting agent and attorney for the said Ainsley Hall, Needham Davis and Jacob and Isaac Barrett. This agreement recited that "whereas the said William Hall, for the said Ainsley Hall, and in the name of the said Ainsley, now holds a judgment at law, for the sum of seven thousand four hundred and fifty dollars, against the said Needham Davis, which is now reduced to the sum of three thousand four hundred dollars; and whereas also the said Jacob Barrett and Isaac Barrett have since the obtaining of the said judgment for the sum above mentioned, purchased a house

GUIGNARD, vs. GLOVER.

and lot in the town of Columbia from the said Needham Davis, wherein the said Needham lately lived, for and in consideration of the sum of eight thousand dollars; six thousand of which have been paid by the said Jacob and Isaac Barrett to the said Needham Davis, leaving the sum of two thousand dollars unpaid; and whereas also the said Ainsley now claims a right to be satisfied of his judgment as aforesaid from the said Needham by its lien on the said house and lot, and for that purpose has issued execution on said judgment, and the sheriff has advertised the house and lot for sale under said judgment. Now so it is to accommodate these different rights and claims between the aforesaid parties and to set out more fully and distinctly these premises which have already been agreed and covenanted, and partly executed by these parties, this writing is now drawn up, viz. in the first place, on the part of the said Ainsley Hall, by the said William Hall, it is covenanted and agreed that the said house and lot be sold at sheriff's sale under the aforesaid judgment; and in the second place it is agreed by the said Jacob and Isaac Barrett that they will bid at the said sale for the said house and lot the sum of two thousand dollars; the balance due by them on the purchase of the same from the said Needham Davis, to the said Needham: *and the above first and second parts have already been executed.*"

From the recitals of this agreement the defendant would have inferred that previous to its execution, the amount due on Hall's judgment had been reduced to three thousand four hundred dollars. The agreement made provision for the payment of two thousand more; and a receipt indorsed shewed that that amount had been paid; and for the defendant it was stated that he was prepared to shew payments to extinguish the balance of one thousand four hundred dollars.

This testimony was objected to on the part of the plaintiff, on the ground that it was incompetent for a third person to shew payment of a judgment to have been privately made, without satisfaction entered on the record, in order to impeach a sheriff's sale under judgment and execution. The presiding judge ruled it to be incompetent.

GUIGNARD, vs. GLOVER.

The irregularity of Hall's execution relied on, was that it had been issued after the expiration of a year and day, without having been renewed by scire facias. But on the execution was endorsed the written consent of the defendant, Davis, that it should so issue. The court decided that there was no irregularity.

Verdict for plaintiff. The defendant appealed on the grounds of error in the circuit court, in having rejected the testimony offered, and sustaining the regularity of the execution.

Against the motion, it was argued that from all the authorities it is clear that a purchaser at sheriff's sale runs no risque but that of the defendant's title and defects and irregularities apparent on the record. He is not to be affected by concealed irregularities in the proceedings, against which he could not guard himself by inspecting the record. 1 *N. & M'C.* 11; 2 *M'ord*, 390; 3 *Caines*, 71; 13 *Johns. Re.* 101. Purchaser at sheriff's sale is protected if the execution be not void. *Tidd's Prac.* This execution was not void, for it was a justification to the sheriff who proceeded under it. *Satisfaction* of a judgment would make the execution void; but that is a technical term and includes the entry on the roll. Payment is not satisfaction. It is not pretended that payment would not conclude the plaintiff in attempting to enforce the judgment. When the payment has been made, defendant has it always in his power to enforce the entry of satisfaction; and if he neglect to do so, it operates as a fraud on subsequent purchasers. A plaintiff who should stand by and see his property levied on and sold, to satisfy a judgment which he had paid, without giving notice, would be clearly estopped: a purchaser claiming under him cannot be in a better condition. It is said that the defendant gave notice of his claim, which was sufficient to put the plaintiff on enquiry. He gave notice that he claimed under a sale made subsequent to the judgment's attaching on the property. It is not pretended that he gave notice of the judgments being satisfied. The result of enquiry, by examining the records, could only have been to satisfy plaintiff that his claim was illegal.

GUIGNARD, vs GLOVER.

In fact however there is no reason to believe that the judgment had been paid. The agreement is ambiguous. It was by the payment which that provided for, *which had already been executed*, that the judgment was reduced to three thousand four hundred dollars.

If the fi. fa. had issued irregularly after the expiration of the year and day, defendant in this case could not take advantage of it. *Bartlett, vs. Jackson*, 6 Johns. 1 Salk. 273. But there was no irregularity. The consent of defendant was equivalent to renewal by sci. fa. The proceeding by sci. fa. was given by statute, 13 Ed. 1, St. 1. c. 45; *Pub. Laws. App.* 3; which provides that execution shall not issue after the year and day, unless the defendant shall have been called on to shew cause against it. It would seem very superfluous to call on the defendant to shew cause, when he admits on the record that he has none to shew. If there be stay of execution until after the expiration of the year and day, execution shall issue without scire facias. 2 Saund. 72, E. N. 3.

In Reply, was quoted 9 Johns. 132.

The opinion of the court was delivered by Mr. Justice Gantt.

To shew that the title derived under Hall's judgment could not avail, it was attempted on the part of the defendant to shew that the judgment had been satisfied; and the objection now raised is, that the evidence of the fact of payment was rejected by the court. The evidence thus alluded to, was an article of agreement between William Hall, as agent and attorney for A. Hall, Jacob and Isaac Barrett, and Needham Davis, entered into on the 4th April, 1820. By this agreement it appeared that Jacob and Isaac Barrett had purchased of Needham Davis, a house and lot, subject to the lien of Hall's judgment against Davis: they had agreed to give for the same eight thousand dollars, six of which they had paid, and William Hall, by the agreement thus entered into, covenanted, as agent for A. Hall, that the property thus sold should be exempt from the operation of the judgment of A. Hall, on the Barrett's paying the remaining two thousand dollars of the purchase money

GUIGNARD, vs. GLOVER.

in part satisfaction of A. Hall's judgment. There were other details in the articles of agreement which need no notice at this time, but will be hereafter referred to, except that the agreement distinctly recognizes the existence of A. Hall's judgment and the balance due under it. The two thousand dollars thus agreed to be paid by the said Barretts to Hall, was to be effected through the medium of the bank, they (the Barretts) to furnish a negotiable note to that amount for discount. Wm. Hall's receipt is attached to the agreement, whereby he acknowledges the receipt of the negotiable note, agreeably to the stipulation on the part of the Barretts; and on February 9th, 1821, the word "satisfied" is written under this receipt, with the name of Ainsley Hall underneath it. It was contended on the trial, that as this tripartite agreement was in reference to the judgment of A. Hall, the word "satisfied" found on it, with A. Hall's signature annexed, was evidence to shew that the judgment itself was fully satisfied; but the court thought that such an interpretation was altogether inadmissible, regard being paid to the context of the agreement, and that it could refer only to one of two things, either that he, A. Hall, was satisfied with what the agent had done in entering into the agreement, or that the negotiable note of two thousand dollars had been satisfied. That to extend the construction beyond this, would be to make the articles of agreement embrace matter not contemplated by the parties who entered into it. It was further said by the court, that although it might have been designed as a satisfaction of the balance due on the judgment, still the evidence of satisfaction ought to have been transferred to the record, and an exonerator then duly entered, or a purchaser without notice of such payment would be protected.

The only notice given by the defendant on the day of sale, was the exhibition of his title under Davis; but Davis could only sell subject to the lien of Hall's judgment, and of the existence of this judgment, open and unsatisfied, every man might and ought to have informed himself, by reference to the records in the clerk's office. There was not the slightest foundation however for the supposition that the judgment had been satisfied in

GUIGNARD, vs. GLOVER.

full, from any thing which appeared on the article of agreement. The entry must necessarily have had relation to the subject matter of the agreement, and could not by any correct rule of construction have been extended beyond it.

As this document therefore furnished no evidence whatever of satisfaction having been made for the balance due on the judgment of A. Hall, although it had been admissible with that design, still under the circumstances of the case it could not have availed the party. The evidence was properly rejected by the court.

The second ground taken for a new trial is, because the sale of said lot was void, the execution under which it was sold being without authority. The execution of A. Hall was taken out and lodged the day on which the judgment was entered up, to wit, on the 30th March, 1818; the execution had been several times renewed; a levy was made on the 9th May, 1822, and on the 3d June following, the lot was sold. Now by an article in the agreement before alluded to, in reference to the balance due on the judgment of Hall, vs. Davis, it is stipulated on the part and behalf of the Barretts, that they shall become collateral security to Hall for the same, in consequence of his release of the lien created by his judgment, on the lot sold by Davis to the Barretts, and Davis, a party to this agreement, stipulates to pay on every sixty days, three hundred and fifty dollars, and on his failure to do so, then either Hall or the Barretts are invested with the right of proceeding immediately against the said Davis, on said judgment, for the balance due thereon. Independently of this clause in the agreement, on the trial it was admitted that Davis had given his assent to the enforcement of the execution under which the levy and sale was made. This double consent of Davis, first by his covenant in the article of agreement and next as respected the execution itself, under which the property was sold, superceded, in the opinion of the presiding judge, the necessity of a renewal of the execution by sci. fa. although a year and a day had elapsed before the time of issuing the execution.

GUIGNARD, vs. GLOVER.

It appeared that the stay of execution in this case had been at the instance of Davis himself, and where there is a stay of execution, it may issue after the year and a day, without sci. fa. 2d *Sanders* 72, *E. note* 3; *Salk* 322; the principle is not different where the execution has issued, and by an agreement with the defendant, the enforcement is delayed beyond a year and day, it may be acted upon without the necessity of a renewal by sci. fa.

But who could take advantage of it, admitting that it were irregular. The case of *Barkeley, vs. Screven*, 1 *Nott & Mc Cord*, 408, clearly shews that third persons can make no objections of this kind, however irregular proceedings may be; and further, that in the sale of real property under execution, supported by a judgment, the purchaser at such sale is not required to look into the regularity of the proceedings; the seal of the court (it is said) is evidence enough for him. I think it very clear that the supposed irregularity of the execution under which the lot was sold, cannot avail the defendant. The only object of a sci. fa. is to afford the defendant an opportunity of shewing that the judgment has been satisfied, and if the defendant admits the fact to be otherwise and consents that an execution may be enforced, why delay the plaintiff by an unmeaning formality.

From every view which I have been able to take of this case, 1st. the policy which seems to have prevailed of protecting purchasers at sheriff's sales, who buy with a confidence that what is done in virtue of the law, will avail where due precaution has been observed on the part of the purchaser: 2d. that there was no such evidence of his judgment having been satisfied as the purchaser was bound to regard, if indeed any satisfaction had been made which did not appear in evidence: 3d. that the delay in enforcing the execution under which the lot was sold was occasioned by the act of the defendant himself, and the irregularity (if any) cured by his after assent to its enforcement; withal that the proceeding appears to have been fair

COUNTS, vs. BATES.

I think there is nothing in the objections raised which can authorize a new trial. The motion is therefore refused.

Huger, Johnson, and Nott, Justices, concurred..

Colcock, Justice, dissent.

Gregg, and *Harper*, for motion.

Chappell, and *Desaussure*, contra.



JACOB COUNTS, vs. JACOB BATES, administrator of Michael Kibler, (deceased.)

An infant purchased a horse, for which he gave promissory notes: Held that the infant's administrator might plead the infancy of his intestate, and that his selling the horse, as part of his intestate's estate, was no confirmation of the purchase, so as to render the administrator liable for the value.

THIS was an action instituted on two promissory notes, which the plaintiff alleged in his declaration were given by the intestate, Michael Kibler: the declaration also contained two counts against the administrator. The first count stated, "that the said Jacob Bates, administrator of all and singular the goods and chattels and credits which were of Michael Kibler, deceased, heretofore, to wit, on the first day of August, in the year of our Lord one thousand eight hundred and twenty-one, at Newberry court-house, in the district and state aforesaid, was indebted to the said Jacob Counts in the sum of three hundred dollars, for so much money by the said Jacob Bates, administrator as aforesaid, had and received to and for the use of the said Jacob Counts, and being so indebted, he the said Jacob Bates, administrator as aforesaid, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said Jacob Counts, to pay him the said last mentioned sum of money, whenever he the said Jacob Bates should be thereunto afterwards requested:" and the other count was as follows, "and for that whereas also, heretofore, to wit, on the first day of August, in the year of our Lord one thousand eight

COUNTS, vs. BATES.

hundred and twenty-one, at Newberry court-house, in the district and state aforesaid, the said Jacob Bates, administrator as aforesaid, had sold and disposed of, to and for the use of the estate of the said Michael, one stud horse, the proper goods and chattels of the said Jacob Counts, in consideration thereof the said Jacob Bates, administrator as aforesaid, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said Jacob Countz, that he the said Jacob Bates, administrator as aforesaid, would well and truly pay to the said Jacob Counts, so much money as the said stud horse was reasonably worth, whenever he should be thereunto afterwards required; and the said Jacob Counts avers that the said stud horse was reasonably worth the sum of three hundred and forty dollars; whereof the said Jacob Bates, administrator as aforesaid, afterwards, to wit, on the day and year aforesaid, at the place aforesaid, had notice."

To the declaration there were two pleas: the general issue, and the plea of infancy of the intestate. To the latter plea the plaintiff replied "that the two promissory notes in the first and second counts of his declaration mentioned, were drawn and given by the said Michael for a certain stud horse, by the said Michael purchased of and from the said Jacob Counts, which said stud horse, after the death of the said Michael, came into possession of the said Jacob Bates, administrator as aforesaid, and was by him, as administrator as aforesaid, inventoried, appraised and sold, for a large sum of money, to wit, for the sum of three hundred dollars, as part of the estate of the said Michael Kibler, deceased, to wit, at Newberry court house; and this the said Jacob Counts is ready to verify, whereupon he prays judgment and his damages, by him sustained, on occasion of the not performing of the said several promises and undertakings, to be adjudged to him. To this replication there was a demurrer and joinder in demurrer. The court overruled the demurrer, and the jury found a verdict for the plaintiff, from which decision of the presiding judge and the verdict of the jury, the defendant appealed, and moved the constitutional court to

COUNTS, *vs.* BATES.

reverse the decision of the presiding judge, in overruling the demurrer, and for a nonsuit, on the following grounds, to wit:

1st. Because the demurrer should have been sustained, and judgment be given on it for the defendant, in as much as the replication to the plea of infancy of the intestate did not answer or deny it, as it should have done, by stating that the goods or property for which the contract was made were necessities, or that the intestate was not an infant, or that he confirmed the contract when he came of age; neither of which was replied.

2d. Because an infant cannot make a promissory note; neither can it be recovered against him or his administrator, when the plea of infancy is set up; and if even the demurrer were overruled, a nonsuit should have been granted on this ground.

3rd. Because the presiding judge decided that the administrator of Jacob Bates, the defendant, confirmed the contract of the intestate, in not tendering back and delivering the property to the plaintiff, from whom the intestate, in his lifetime, purchased, whereas the administrator had no right or power to do so, and in so doing would have acted contrary to law.

4th. Because the presiding judge decided contrary to law in overruling the demurrer and in sustaining the replication, and in precluding the defendant from the benefit of the plea of infancy, to which he was entitled: the fact of the intestate's being an infant was incontrovertibly established.

The opinion of the court was delivered by Mr. Justice Colcock.

It is unnecessary in this case to follow the counsel through the wide range which they have taken in their pleadings and their argument, for it is obvious to the court that the action can not be maintained under any state of pleadings; and it is their duty to put an end to the litigation of the parties. From the evidence it is clear that the notes were given by the defendant's intestate when under age. Two questions then arise:

1st. Can the administrator plead infancy, or take advantage of it on the general issue?

2nd. Was the sale of the horse, by the administrator, a confirmation of the purchase made by the infant?

COUNTS, vs. BATES.

The protection which the law intends to afford infants, would be but partial, if their deaths would secure to those who might impose on them all their unlawful gains. The object of the law, as I conceive, is not only to preserve their estates from artful and designing men, but also their morals and health. It is however not a matter of doubt that an executor or administrator may plead the infancy of the testator or intestate. It is the daily practice of our courts, and well supported by authority. *Strange*, 1101; *Selwyn*, 142.

But in such a case as this (assumpsit) it might be given in evidence under the general issue, and the contract be avoided in that way; nay some go so far as to say that the promise of an infant is void, and assign that as a reason why it may be given in evidence under the general issue. *Salk.* 279; 4 *Dallas*, 130; 3 *Bacon*, 610; *Tit. infancy and age*, I. 7; *Selwyn*, 137; *In Cro. Eliz.* 126, it is said the promise of an executor to pay the debt of his infant testator is nudum pactum, for the infants promise being void, there is no consideration for that of the executor.

It is then clear that the administrator might take advantage of the infancy of his intestate, even if the declaration were amended and the pleadings properly made up. The second question admits of less doubt: the infant alone can confirm his contract. The law, in order effectually to protect the rights of infants, has declared that when one sells to an infant any article of property, and takes a note for the payment of the money, the property delivered is to be considered as a gift to the infant. In 3 *Bacon* (title infancy and age. I. 3) p. 604, it is said, "if one deliver goods to an infant upon contract, &c. knowing him to be an infant, he shall not be chargeable in trover and conversion or any other action for them; for the infant is not capable of any contract, but for necessities; therefore such delivery is a gift to the infant," and this appears to be an indispensably necessary part of the system of protection which the law intends for the infant; for if men of loose principles knew that on a refusal to pay on the part of the infant, they could obtain a re-delivery of the article sold, the risque in dealing

CAMPBELL, vs. MORSE.

with infants would be so much diminished that they would not hesitate to incur it. The administrator found this property, the horse, among the property of deceased; he was bound to consider it as a part of his estate; the law declares it was a part of his estate; he could act no otherwise than appraise and sell it. If any subsequent conduct of his has rendered him liable, as for a devastavit, let him be pursued by those who are interested, in a proper manner. The motion for nonsuit is granted.

Gantt, Richardson, and Johnson, Justices, concurred.

J. J. Caldwell, for motion.

O'Neal, and Johnson, contra.

WM. CAMPBELL, vs. Z. MORSE.

The waggon of defendant, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly, damaged the goods: Held that defendant was liable for the damage so occasioned.

THE defendant undertook to haul in a waggon and deliver goods for the plaintiff, from Charleston to York. The action was brought to recover for damage done to the goods while on the road. The plaintiff proved the goods were injured to the amount of about \$400; that he kept and sold them at about that loss. It was not however proved that he ever offered to return the goods to defendant. or gave any notice to defendant of the loss or intention to sell, but sold them with his other goods. Defendant proved that at Cane Creek, in Lancaster district, the bridge was impassable, and the usual and only crossing place was at the public ford; that he had a sufficient team of five horses and only 2500lbs. of load; that when he was about a quarter of a mile from the said creek there fell a small shower of rain, which from all human appearances could not effect the creek; that the only place for the encamping of waggons was beyond the creek; that a heavy cloud appeared to lie up the creek; that between sun down and dark he entered the creek, when the water did not rise up to the bed of the waggon; that the ford of the creek upon the

CAMPBELL, vs. MORSE.

opposite side from which he entered was very bad; that defendant knew the ford and had crossed it in going down; that he then stuck or stalled, the hind wheels sinking down, and in twenty or thirty minutes the water rose so rapidly as to be half way up in the body of the waggon and do the injury complained of by the plaintiff. A witness also proved that he had lived on this creek for forty years, but he never saw it rise before or since, as it did on that occasion. Plaintiff recovered full value of the goods. Defendant appealed on the grounds:

1st. Because the injury proceeded from the act of God, and as such defendant is not liable:

2d. Because as plaintiff kept and sold the goods, without notice to defendant, he was thereby discharged.

The opinion of the court was delivered by Mr. Justice Colcock.

The doctrine in relation to common carriers is so well settled, that little need be said to shew that the defendant is liable for the loss which has been sustained by the plaintiff in this case. That he is a common carrier cannot be doubted; all who carry goods from one place to another for hire are common carriers, and they are held responsible for all losses, except such as happen by inevitable accident, as by the act of God or the enemies of the country. The evidence reported in this case shews no such inevitable accident; even the view of it presented by the defendant himself will not support him; for admitting it possible that so sudden and rapid a rise of the creek as he states did occur, yet it is manifest that if he had gone through without stopping, no injury would have resulted; his stalling then and not the rise in the creek was the cause of injury, and if such a circumstance were to operate as a relief from liability, then carriers of this description would be always exempted. But this is not all; his team were not only insufficient, but he himself guilty of gross neglect; for he should have ascertained the state of the ford before he entered it.

The last ground presented in the brief is rather a novel one. That an individual who has sustained an injury should be compelled to run the risque of a still greater one before he

LOOMIS & Co. vs. PEARSON & M'MICHAEL.

can obtain redress for the first, certainly does not comport with the boasted wisdom and justice of the law.

There was certainly no obligation on the plaintiff to deliver the goods to the defendant, nor to give him notice of sale; indeed it is nothing to him whether the goods were sold or not, so that the extent of the injury was otherwise satisfactorily proved. The evidence offered was such as the nature of the transaction afforded, and it appears was sufficient to satisfy the jury. The motion is refused.

Gantt, Richardson, Johnson, and Huger, Justices, concurred.

Williams, for motion.

Clendenin, contra.

H. LOOMIS & Co. vs. PEARSON & M'MICHAEL.

One partner, after dissolution. executed a note in the partnership name and accepted service of a writ in the same way, on which judgment was obtained by default: execution levied on the goods of the other partner, which were sold: one term intervened between the levy and the motion to set aside proceedings; which motion was granted.

THIS was a motion to set aside the proceedings, so far as regarded M'Michael. The following facts appeared in evidence: D. W. Pearson, one of the firm of Pearson & M'Michael, signed the name of the firm, after its dissolution, to a promissory note, drawn in favor of the plaintiffs. H. Loomis & Co. who issued a writ thereon, the service of which was accepted by said Pearson in the name of the firm. Judgment by default was entered up, 17th April, 1823, and a fi. fa. lodged with sheriff, who levied on a negro boy, the property of M'Michael, by virtue of this and another execution in favor of D. Rumph. The sheriff sold said negro, 1st Monday in January, 1824. M'Michael knew nothing of these proceedings till the levy was made. One court intervened between the making of the levy and the present application.

The presiding judge refused the motion, on the ground, that M'Michael's delay in making this application was a waiver of the objection as to irregularity.

LOOMIS & Co. vs. PEARSON & M'MICHAEL.

To reverse which decision the defendant appealed; because the proceedings was utterly void, and there was no such laches on the part of said defendant, after he had notice, as would amount to a waiver of irregularity.

The opinion of the Court was delivered by Mr. Justice Colcock.

In this case two questions are presented for determination: 1st. whether one copartner can bind another by making a note after the dissolution of the copartnership: 2d. whether one copartner can enter an appearance for the other.

It is unnecessary to go into any reasoning upon either point, for both have been solemnly adjudicated by this court.

In the case of the *Bank of South-Carolina, vs. Humphreys & Mathews*, 1 *M'Cord*, 388, it was decided that after the dissolution of a copartnership, one partner cannot bind the other, by drawing a note in the name of the firm, without a special power given to him for that purpose. And in the cases of *Keckley, vs. Keen and Perry*, decided in Charleston, May term, 1822, and that of *Haslet and others vs. Street and others*, 2 *M'Cord*, p. 311, it was determined that one copartner cannot authorise an appearance for the other.

On either ground the motion must be granted and the judgment set aside: the objection of the defendant is not to mere irregularity, which can be cured by pleading, but it extends to the whole proceeding, which as to him is absolutely void. The motion is granted.

Richardson, Nott, Huger, and Johnson, Justices, concurred.

T. W. Glover, for motion.

J. M. Felder, contra.

DAVID RAMSAY and others, vs. ROBERT MARSH and others, defendants in separate suits.

By agreement of counsel, commission to take testimony was issued, to be used in several cases: held that the costs of it could be taxed but in one of the cases.

Costs of "special matter and agreement" allowed in cases where the issues were made up, though afterwards discontinued.

THE question in this case arose upon a motion of Plaintiff's attorney, to strike out of the bill of costs two items: first, "a commission" in each case, which was taxed by the clerk for the defendant's attorney; and second, "special matter and argument" which was taxed in like manner. It appeared to the court, that by consent between the counsel and to accommodate the plaintiff's attorney, it was agreed that but one commission should issue, to be entitled of all the cases and to be read in evidence in all. His honor decided that under these circumstances the commission was correctly taxed in each case.

From this decision the plaintiffs appealed and moved to have the same reversed on the ground, that the allowance of £2 to the attorney for each commission, was intended by the legislature as a compensation for his actual trouble, and that therefore the taxation alone in these cases was contrary to law.

It appeared that in the case against Marsh, the order of nonsuit was confirmed by the constitutional court, at the spring sitting, 1822, and that in all the other cases pleas were filed, issues made up and the cases marked "discontinued" on the issue docket, at October term, 1822. The defendants also appealed on the grounds:

1st. Because under the circumstances of the case, the taxation should not have been opened:

2d. Because the item of special matter and argument was properly allowed, and should not have been stricken out:

The opinion of the court was delivered by Mr. Justice Colcock.

Under the circumstances of these cases, the agreement of the counsel to make one commission answer for all the cases was a very proper one; as a recovery on the part of the plaintiff would no doubt have rendered it unnecessary in the other cases

RAMSAY, vs. MARSH.

to go again into his title, and one commission would have been held sufficient by the court. One only therefore can be properly charged, and the £2. charged, in all the cases not tried, must be stricken out.

As to the second charge, it has been the established practice to allow it in all cases, not within the summary jurisdiction, where the issue has been made up, and therefore those charges may be allowed—in all the cases where issue was regularly made up and the cases docketed. The motions are granted.

Johnson, Huger, Richardson, and Nott, Justices, concurred

Gantt, Justice, dissenting.

1st. As respects the charge for commission in each case, I at first doubted as to the correctness of this charge, because the same interrogatories were made to apply to each case, and it appeared at the first blush to be unreasonable, that where only one commission had in fact been issued, although entitled of all the cases wherein David Ramsay and others were plaintiffs against the several defendants, that this item should be allowed in each bill of costs; but then it was made to appear that the attornies for the defendant had consented to this mode of obtaining the testimony, at the instance of the plaintiff's attorney, and to save him the necessity of issuing in each case. Now as the trespasses for which the several actions were brought were several and distinct, and the commission entitled of each case, whereby its applicability to each was recognized and admitted, I thought the charge allowable. But I am less dissatisfied with the reversal of the decision below, as respects the commission, than the item for special matter and argument.

By the fee bill, the several items are particularized which go to make up a bill of costs: among these is enumerated the charge for "special matter and argument." What shall constitute special matter and argument is not defined; but from the terms used it must necessarily mean some incidental matter in the progress of the suit, wherein in truth and fact argument

TREASURER OF THE STATE, vs. M'GUIRE.

was deemed necessary. Such as an argument on a demurrer, one for the continuance of a cause which stands marked for trial, and the like. But when the plaintiff discontinues a cause by leave of court, which is always granted, this cannot in my view constitute special matter and argument, within the meaning of the act. I infer this, because a defendant cannot consistently with the established usage and practice of the courts, oppose a motion for nonsuit or discontinuance. A discontinuance by leave of court is a voluntary withdrawal of the suit, and puts an end to it, and it cannot readily appear how it should subserve the interest of a defendant to oppose a motion of this kind. Under this view of the law, I thought and so decided, that the charge for special matter and argument, in all the cases discontinued by the plaintiff, should be stricken out and that it should be allowed only in the case brought up to the constitutional court, where the question was argued, whether the plaintiffs were entitled to support their action or should be nonsuited, as had been ordered below.

A. Bowie, for plaintiffs.

Noble and Wardlaw, for defendants.

TREASURER OF THE STATE, vs. PETER M'GUIRE.

The return of "nulla bona" to an execution against the administrator of a deceased sheriff, is sufficient, under the act of 1795, to sustain a suit on the sheriff's bond, against his sureties.

The entry of the word "satisfied" by the sheriff on an execution, is sufficient evidence of his having received the money which it commands to be made.

The verdict of a jury "we find for the plaintiff, and assess damages to ———," is sufficient in a suit on sheriff's bond, to authorize the entry of judgment, on the issue, of non est factum.

THE actions being brought on a sheriff's bond, and the general issue being pleaded, the defendant moved in arrest of judgment in the two cases, first above stated, on the ground that the verdicts of the juries do not find the bond declared on to be the deed of the defendant.

TREASURER OF THE STATE, vs. M'GUIRE.

These were actions on a sheriff's bond, brought against the defendant, as security for Wright C. Tyson, former sheriff of Richland district, who came into office in February, and died before the next return.

The plaintiffs produced executions, endorsed by the sheriff "satisfied in full, April, 1816." No return of "nulla bona" or any execution against the sheriff was produced in evidence. The plaintiff produced two executions against Bineham, as administrator of Wright C. Tyson, with nulla bona endorsed thereon, but no return sworn to by the sheriff. One of these executions was on a judgment confessed by the said administrator, and the other was a judgment by default against said administrator. The plaintiffs rested their cases on this evidence. The defendant moved for a nonsuit on the following grounds:

1st. Because the return of nulla bona on the said executions, against the administrator of the sheriff, was not such a return of "nulla bona" as is required by the act of the legislature, to authorise a recovery against the sheriff's securities:

2d. Because by the confession of judgment in one of the cases and judgment by default in the other case, on which the said executions were issued, was an admission of assets, and the return of nulla bona against the administrator was not even prima facie evidence of the insolvency of the said sheriff; no plea of plene administravit having been pleaded in either case:

3d. Because the mere entry of "nulla bona" on said executions was not sufficient to sustain the actions, when the sheriff had not sworn to said indorsement on the executions.

The motion for nonsuit was overruled by the court. The defendant then offered evidence to prove that the estate of the sheriff was solvent. His honor charged the jury that the evidence was sufficient to sustain the actions. With regard to the proof of the receipt of the money by the sheriff, his honor stated that the entry of the sheriff on the back of the execution "satisfied in full," was sufficient evidence of the money having been received by him; and if the money had been received by the plaintiff in the action, it was incumbent on the defendant to have proved it.

TREASURER OF THE STATE, vs. M'GUIRE.

The defendant now moved for a non suit, in each of the said cases, on the same grounds taken that were in the court below. If that motion should fail, then the defendant moved for a new trial on the grounds:

1st. Because the return of "*nulla bona*" against the administrator of the sheriff, on the execution issued on a judgment confessed by the administrator of the sheriff, and on the execution on a judgment *by default* against the said administrator, were neither of them sufficient in law to warrant a recovery against the securities of the sheriff.

2d. Because it was not a compliance with either the letter or spirit of the act, which requires a return of "*nulla bona*" against the sheriff, to warrant a recovery against his securities.

3d. Because in the actions on which the said executions were issued, there had been no plea of *plene-administravit* by the administrator; but on the contrary there was an admission of assets, by his confession of judgment in one case, and in the other case, by suffering judgment to go by default.

4th. Because the sheriff had made no regular, sworn return on either of said executions, on which plaintiff relied as a return of "*nulla bona*."

5th. Because the return of the sheriff on the plaintiff's execution "*satisfied in full*," was not sufficient proof of the money having been paid to the sheriff; and his honor was mistaken in charging the jury that the burden of proof was thereby thrown on the defendant, to prove that the money had been paid to the plaintiff. The jury ought to have been allowed to conclude that the satisfaction had been made to the plaintiff, from the distressed circumstances of the plaintiff and his sleeping so long over his claim.

6th. Because the verdict was contrary to law and evidence.

The opinion of the Court was delivered by Mr. Justice Colcock.

I shall not consider the grounds in the order in which they were presented in the brief; but in the order in which they were presented on the trial. The first, and I may add the only important one, is whether the return of "*nulla bona*" against the

TREASURER OF THE STATE, vs. M'GUIRE.

administrators of a deceased sheriff, is a compliance with the spirit of the act of 1795. The act, after fixing the amount of the security to be given by the sheriff and directing that their bonds shall be deposited in the treasury office, and that a copy certified shall be good and sufficient evidence in the courts of the state, in any suits to be instituted against them, concludes with, "Provided nevertheless, it shall not be lawful for any person who shall conceive himself aggrieved by any sheriff, to commence an action against the security hereby required to be given, until a return of 'nulla bona' shall have been made on some execution, to be issued against the said sheriff, either at the suit of the person aggrieved or some other person;" and adds that after such return, the securities shall not be entitled to an imparlance.

This is an alteration of the common law: it deprives the citizens of a common law right which they had to call on the securities of a sheriff, without even commencing an action against him, and was intended as a partial protection to the securities; for when this course was pursued, the consequence was that the securities were driven to the necessity of suing in their turn their principal; and if he had any property, it was conceived to be but just that those who had been injured by him should be required in the first instance to take hold of that property, provided it could be obtained by the ordinary mode of proceeding—an execution against the goods. But the legislature never intended that the party injured should prove that the sheriff was insolvent; that he should be compelled to pursue a sheriff, through all the courts of law, to ascertain if he had not some hidden treasure; for this in most cases (in all of those now before the court) would have amounted to a complete protection to the sheriff. One who had a small demand, would be content to lose it, rather than expend his time and perhaps a greater amount of money than that which he claimed, in pursuit of it. An execution then against the estate of the sheriff, after his death, proves as much as an execution against the estate of the sheriff during his lifetime, viz: that there is no property of his which can be

TREASURER OF THE STATE, vs. M'GUIRE.

found; and this is all the law intended to require of the party aggrieved, before he proceeded against the securities.

Now let us see to what result the argument of the defendant's counsel will lead. The law requires that there should be a return of nulla bona against the sheriff. The sheriff is dead; he died before the party aggrieved knew that he had sustained any injury by his acts. You cannot get an execution against a man after his death, therefore the plaintiff is remediless; the representatives of the deceased sheriff are to keep all the money he received before his death. Can it be believed that the legislature intended to produce such monstrous injustice? Again, the words of the act shew the meaning of the legislature, as well as the object which they had in view. Their language accords with their intention. A nulla bona is required; now the return of a nulla bona is the return which is made on an execution against one's goods (a fieri facias); it is therefore not an execution against the person which is required, and if against the goods, it may as well issue after his death as before.

The next ground of objection is, that the return of the sheriff is not sworn to. This was done before the evidence went to the jury, and that the court has the power to order the officer to complete his return, cannot admit of a doubt. From the course of the argument, it appears as if the objection was intended to extend to the form of the return; but this would be futile indeed, when the return is in the very words of the act. I think I have shewn that it was not the intention of the legislature to require that the party aggrieved should prove that the sheriff was insolvent, before he proceeded against the securities; it is therefore unnecessary to examine whether this was or was not proven by the records against the administrators, or was or was not the fact.

As to the entry (made in the hand writing of the sheriff) being sufficient evidence to prove prima facie, the receipt of the money by him, little need be said. The execution commands him to make the money, and he says by the word "satisfied" that it has been made: it follows as a fair conclusion, that it was made by him. The practical result of this, will at once shew

MITCHELL, *vs.* HUMPHRIES & DAWKINS:

the propriety of it. If the party aggrieved were required to produce the sheriff's receipt, where would he find it? In the possession of the plaintiff? Perhaps so. Then he must find the plaintiff; but perhaps it is not in *his* possession, as it might be in the possession of some other who had paid it for him, and he must be sought; whereas if the fact be that the money has been paid away by the sheriff, he is in possession of the receipt; or if received by the plaintiff or the attorney, he must be in the possession of the order to enter the satisfaction.

I come down to the last ground in arrest of judgment, and although it must be admitted that the verdicts are informal, yet they are sufficient, when taken in connexion with the pleadings and evidence (which was full and complete as to the execution of the bond as required by the act) to justify a refusal of the motion. The words "we find for the plaintiff," when not counteracted by any finding for the defendant, are sufficient to convey the intention of the jury, that they meant to find for the plaintiff, on all the issues submitted. But in this case, the verdict of the jury, "we find for the plaintiff so much damages" are conclusive of a finding for the plaintiff, on the issue of *non est factum*; for without such a finding, they could not have assessed the damages.

Levy and M'Willie, for motion.

Starke, contra.

DANIEL O. MITCHELL, *vs.* JOHN HUMPHRIES & ELIJAH DAWKINS.

After the adjournment of the court, at which the verdict was obtained, it is too late for the defendant to obtain the order of court for submitting the condition of a penal bond to a jury.

THE plaintiff had sued on a penal bond, conditioned for the delivery of negroes to him as sheriff of Union district.

The defendants had only pleaded *non est factum*, and issue was found against them: this was at spring court, 1824. Plaintiff entered up his judgment 12th April, 1824, for penalty of bond; execution lodged with the sheriff 13th April, 1824, and

MITCHELL, *vs.* HUMPHRIES & DAUKINS.

levied on the defendant's land the 12th of May, 1824. Execution was also issued for the penalty of bond, on the 19th May, 1824: at chambers, Mr. Justice Johnson granted an order that all further proceedings on the above execution should be staid, until the plaintiff submit the condition of the bond on which the action was brought to a jury.

The plaintiff moved to reverse that order on the following grounds:

1st. Because the defendants ought to have obtained a rule of court, to compel the plaintiff to submit the condition of the bond to a jury, before the plaintiff had taken out his execution.

2d. Because as the plaintiff had entered up his judgment, and issued his execution, and levied on defendant's land, it was then too late to apply for an order to submit the condition of the bond to a jury.

3d. Because a judge at chambers has no power to grant such orders in vacation.

The opinion of the court was delivered by Mr. Justice Colcock.

This case is decided by the case of *Durkey, vs. Hammond*, 2 *Con. Rep.* 151: after execution, the defendant must seek his remedy in equity. If he would not avail himself of the provisions of the act made to relieve him from the expense and trouble of an equity suit, he can now have no claim for the assistance of this court. He should have obtained the order of court, to compel the plaintiff to submit the condition of the bond, at all events, before the court adjourned at which the verdict was obtained.

The motion is granted.—*Huger and Gantt*, Justices, concurred.

Williams, for motion.

Herndon, contra.

IRA GRIFFIN, vs. JOSEPH WAEDLAW.

It was proved on the part of the plaintiff that defendant went into possession of the land in dispute under I. P. by whom it had been mortgaged; that the mortgage was foreclosed in equity, the land sold under decree, and purchased by plaintiff: Held that plaintiff was not bound to shew a grant from the state, or any other title, as against defendant.

It was incompetent for defendant, in this action, to shew that the mortgage on which the decree had been obtained was fraudulent.

THIS was an action of trespass, to try title to a tract of land. The plaintiff produced the exemplification of proceedings in the court of equity, *Elijah Foster, vs. John Foster*, in which was a decree to foreclose a mortgage of the land in dispute, made by John Foster to Elijah Foster, on 1st March, 1819: deed from Livingston, commissioner in equity, to plaintiff, dated 6th May, 1822. The bill was filed on the 10th January, 1822. Wm. B. Lewis then proved that John Foster was in possession of the land up to January or February, 1822, when the defendant took possession; he understood from the defendant that he entered under the authority of John Foster, who had been in possession from the latter part of 1818, or early in 1819: the annual rent worth about fifty dollars.

Here a motion for nonsuit was made, on the ground that the plaintiff had not traced his title to any grant from the state; but overruled, because it having appeared that the defendant had gone into possession by the authority of John Foster, he was considered as his tenant, and could not be permitted to dispute the recovery under which the land had been sold. The defendant then attempted to shew a title in himself and produced—

1st. A deed from J. Hamilton, Sheriff of Abbeville district, dated 8th May, 1822.

2nd. A judgment, *John T. Coleman vs. John Foster*, signed 1st April, 1819, and execution the same day; levy (endorsed) 6th May, 1819; land sold on the 3rd January, 1820, by John Newby, Sheriff, to James Coun. It further appeared that Foster had said that the mortgage on which the decree of the court was founded, had been given to cover the property

GRIFFIN, vs. WARDLAW.

from creditors; that the records had been searched and no incumbrance found; that Foster had also said that Coun had bought the land, and he had held it as his (Coun's) tenant at will. Coun said he had bid in the land as the property of John Foster, and paid his own money for it; but that John Foster afterwards re-paid him his money. In reply to this, the plaintiff proved that a judgment had been recovered against John and Elijah Foster, on a note which they said had been given for the original purchase money of this land, and that Elijah had been arrested on a *ca. sa.* issued on that judgment, and had paid it, and was discharged by assigning the decree of the court of equity to the plaintiff, and that both Elijah and John had said that the mortgage was given by John to Elijah, to counter secure him for being his security on the note to Taylor.

On this evidence, the jury found a verdict for the plaintiff, and the defendant now moved for a new trial on the grounds:

1st. That it should have been left to the jury to decide how the defendant's possession commenced:

2nd. That the plaintiff did not produce a sufficient title:

3rd. That if plaintiff's title was *prime facie* good, the defendant shewed a better.

The opinion of the Court was delivered by Mr. Justice Colcock.

It appearing in proof that the defendant in this action was in possession by the authority of John Foster, it was sufficient for the plaintiff to shew a title from John Foster. It is well established that the defendant to a judgment or decree cannot hold against a purchaser under such judgment or decree; and the rule would be of little practical utility, if it did not extend to one put in possession by him. The non-suit was then properly refused, and the defendant must rest on a title in himself, and disprove if he can that he went in under John Foster. I will now enquire whether he has done so.

The deed produced by him is dated two days after the plaintiff's deed; but it is said that it is the deed of the Sheriff, and it must have relation back to the date of the judgment

GRIFFIN, vs. WARDLAW.

which operated as a lien on it. Now the objection to this is, that the defendant himself has shewn that the Sheriff had no legal authority to make the deed. Coun says he purchased the land for John Foster, as a friend, and paid the Sheriff the money, and that he was afterwards repaid by John Foster. The lien is then discharged, and it was not competent for Coun, after he was repaid, to authorise the Sheriff to make a title to the defendant. This would be a very convenient mode to cover property. The deed may be considered as a good deed from John Foster, by his agent, as of the date at which it was made, and as such, can have no operation or effect against the plaintiff's title. It is contended however, on the part the defendant, that his deed must avail, because the mortgage from John to Elijah Foster was fraudulent. But to this conclusive objections are presented; first, that the judgment of a court of competent jurisdiction, upon a matter of which it has cognizance, cannot be impeached collaterally, but it stands firm until vacated or reversed, and binds not only parties but privies. 18 Johnson, Rep. 141 and 561, *Halt vs. Salston & Schenck*.

If this were not the case, there would be no security to purchaser nor any end of litigation. Could the plaintiff in this case, have imagined that John Foster or any one claiming under him would be permitted to come in and say, this mortgage was fraudulent? Could he have been prepared for such an objection? Again, if John Foster could have contested this point, after the decree of the court of equity and while that was in force, when would it be settled? not by this decision. If the declarations of a defendant could be admitted to prove that a bond or note, on which a judgment had been obtained, was void, having been given for usury, illegal consideration or by duress, thus collaterally destroying the judgment, there would be no safety in purchasing at Sheriff's sales. An unprincipled man or a disappointed debtor might be induced to make such declarations, and thus deter men from buying at a Sheriff's sale any of his property. If a solemn deed and a decree of a court are not estoppels, I am at a loss to conceive what are. But it is a waste of time to say more on this point; the

GLENN, vs. M'CULLOUGH.

authorities are clear as well as the principle. See *Phillips on Evidence*, 226. But if it had been competent to assail the mortgage in this trial, the evidence offered did not prove that it was fraudulent. The declarations of the Fosters were proven to be different at different times; and the internal evidence offered by the circumstances of the case, preponderate in favor of the legality of the mortgage. The proof that John Foster was in embarrassed circumstances would readily induce a belief that security had been required of him by Taylor, when the land was sold: the subsequent arrest of Elijah on a ca. sa. and satisfaction of the debt to Taylor by him, together with the execution of the mortgage and the decree thereon, irresistably lead to the conclusion that the mortgage was a real one.

But this is not all; if the deed to the defendant could be considered as a deed from the Sheriff, and could have relation back to the judgment, yet it would not avail the defendant, while the mortgage remains of force and the decree of the court unreversed; because the mortgage is prior in date to the judgment, and does not loose its binding efficacy as to a judgment, from its not being recorded. See *1st Bay*, 304, and *2nd Bay*, 80. But this ground may be considered as gratuitous, enough having been before determined. In every possible point of view, and giving the defendant the full benefit of Coun's testimony, it is clear that the verdict is right, and the motion for the new trial is therefore refused.

Richardson, Johnson, Natt, concurred.



EXECUTOR GLENN, vs. JOSEPH M'CULLOUGH.

Defendant, maker of a promissory note, said "I gave the note, but it was for rotten tobacco, and I will never pay it; but I will not plead the statute of limitations." Held a sufficient acknowledgement to take the note out of the operation of the statute.

THE action was brought on a promissory note given for tobacco. The defences relied on were, that the tobacco was worthless, and the statute of limitations. The following expression of defendant was relied on to take the case out of the

GLENN, vs. M'CULLOUGH.

statute;—"I gave the note, but it was given for rotten tobacco and I will never pay it; but I will not plead the statute of limitations." His honor overruled a motion for a non-suit, and under his charge, the jury found for plaintiff.

A motion was now made for a non-suit—

Because some *promise*, either express or implied, is necessary, to prevent the operation of the statute, and there was none in this case.

A motion was also made for a new trial—

Because his honor erred, in charging the jury, that defendant was entitled to no benefit from his declaration that the tobacco was rotten; although it was a part of the same conversation above referred to.

Thompson, for motion, contended that there should be some *promise*, within four years, take a case out of the statute of limitations, and referred to *Lawrence vs. Hopkins*, 13 Johns. 288. If an admission of the debt be made, but with words denying the plaintiff's right to recover, no inference can arise of a promise express or implied. The admission can only be construed as evidence of a promise; but the express refusal to pay, and denial of the right to recover, exclude any such implication. *Sands vs. Gelston*, 15 Johns. 518; *Danforth vs. Culver*, 11 Johns. 146. The promise not to plead the statute of limitations is not enough. It is a new and substantive promise for which there was no consideration; and not competent, for the purpose of reviving a former promise.

Irby, contra, thought this case had been already decided. It was formerly before this court. The court then said the words were sufficient to take the case out of the statute; but the pleadings were wrong, and the case was sent back on the ground to be seen in the case of *Glen vs. M'Cullough*. The words in this case differ from those in the cases quoted from Johnson. Where a party admits his signature to a note, but says he has paid it, he affirms the very fact of which the statute raises the presumption. In other instances, he is bound to prove the truth of all words accompanying his admission, denying the right to recover. *Dean vs. Pitts*, 10 Johns. 35.

M'COOL, vs. M'CLUNY.

The opinion of the court was delivered by Mr. Justice Richardson.

It is now well settled that an *acknowledgement* of a debt is sufficient to take it out of the statute of limitations, though there has been no new promise. 12 Vin. 192; 2 Sand. 64, note; 11 Johns. 146.

In the case before us, the defendant plainly acknowledged the note to be his, which takes it out of the statute; but said he would not pay it, because given for rotten tobacco, and yet that he would not plead the statute. Here then he takes upon himself the burthen of shewing a want of consideration, after acknowledging the debt. It is, in my opinion, precisely like the case of *Dean vs. Pitts*, 10 Johns. 35, where the maker of a note admitted it to be his, but said he would make it appear that it had been paid; which was held to cast upon him the necessity of proving payment. The motion is refused.

JAMES A. M'COOL, vs. JAMES M'CLUNY.

Action on the case for procuring the defendant to be illegally arrested on a ca. sa. The declaration alledged that the ca. sa. had issued in a case in which "J. M." was plaintiff; but in the ca. sa. offered in evidence, "J. M. & Co." appeared to be plaintiffs: Held no variance; the words "and Co." having no signification.

But as the execution was void, the judgment of which it issued having been irregular and set aside, trespass and not case was the proper action.

This was an action on the case, against the defendant for causing and procuring the plaintiff to be illegally arrested under a ca. sa. the judgment for which it was issued having been set aside for irregularity. The declaration stated that the ca. sa. had issued in a case wherein James M'Cluny was plaintiff, and James A. M'Cool defendant; but, as it appeared by the ca. sa. now offered in evidence, it had issued in the name of James M'Cluny & Co. vs. James A. M'Cool; for which variation the court ordered a non-suit. Plaintiff's attorney then moved the court for leave to amend, as the pleadings on the part of

M'COOL, vs. M'CLUNET.

defendant were in an imperfect state; this was however refused. Plaintiff then gave notice of an appeal on the following grounds:

1st. Because the evidence offered was sufficient to support the declaration.

2nd. Because the setting out the name of the Plaintiff in the ca. sa. under which the plaintiff had been illegally arrested, was surplusage; as it might have been stricken out, and the declaration still would have been good.

3rd. Because at all events, the plaintiff ought to have been permitted to amend.

A. W. Thompson, for motion, contended that this was not a fatal variance. It was not necessary to the sustaining of the action to have alledged in whose name the execution issued; it was an immaterial averment, and might have been stricken out, without injury to the declaration; and if so, the variance will not vitiate. Surplusage may be stricken out. There is a difference between actions in form ex-contract and those of ex delicto; contracts must be more particularly set forth. But all events, leave should have been given to amend; which has been done even after verdict. In fact there was no variance or an immaterial one; the addition "& Co" was of two unmeaning characters. *Cited 1 T. R. 235; 9 East, 162; Phil. Ev. 171; 2 Esp. Dig. 492; 2 Con. Rep. 249; 1 Chit. Pl. 372; 13 East, 547; 14 Johns. 89; 9 Johns. 82; 1 Chit. Pl. 231; 2 M'Cord, 49.*

Williams, contra, contended that although the allegation might have been omitted in the declaration, yet being inserted, it became material. The wrong description of the execution might mislead a defendant. Time is not material, but the foundation of the action must be correctly set forth.

But on another ground the non-suit must be supported. There being in point of law no judgment on which the ca. sa. could issue, it was void; the arrest was false imprisonment, and this action should have been trespass and not case. If the proceedings were not void or irregular, the plaintiff could not maintain any action for the injury. If trespass *vi et armis* will

M'COOL, vs. M'CLUNY.

lie, case will not. If it appear that the action cannot be supported, the court will not set aside the non-suit, though this specific ground was not taken in the court below. Cited 3 *Wils.* 341; 2 *Blac. Rep.* 1 (S. C.) 845; 2 *Str.* 393; 2 *Wils.* 226; 2 *Bl. Rep.* 694; 1 *Esp. Dig. part 2nd.* 193.

Thompson, in reply. Trespass lies when the injury proceeds directly from the act of the defendant; but the injury here proceeded indirectly from the act of suing out the execution. The act of the Sheriff was the direct occasion of the injury; and even if the defendant had been in company with him, the plaintiff might have waived the trespass and gone for the damages sustained by the expenses to which he was put, and his lying in gaol. The process on the face of it appeared to be regular; the plaintiff had no reason to think it otherwise. A party is not to be charged with a trespass which he did not and could not know that he was committing.

It is not universally true that where trespass will lie, case will not; as in the action for crim. con. 1 *Chit. Pl.* 38, 104.— On the subject of variance, he further cited; 5 *Johns.* 84; *Id.* 89; 9 *Johns.* 82.

The opinion of the court was delivered by Mr. Justice Colcock.

In this case the plaintiff's motion must succeed, on the grounds stated in his brief. It is conceived that there is in fact no variance; the letters "& Co." have no signification in legal proceedings. They can amount to no definite description of person; nor indeed are they evidence that there were any other parties to the suit than the one specifically named. If indeed there were any such other parties, all the rules of pleading require that they should be named. But if the words are permitted to receive their usual meaning, it would not be fatal; for the action is not founded on the Exon. The complaint is that a trespass has been committed; and if it had been committed at the instance of several, all of whom would have been liable, yet it does not follow that the injured party must sue them all; each is answerable; and therefore, it is not a mistake—

M^cCOOL, vs. M^cCLUNY.

ment to say that a trespass was committed by one, when that one was accompanied by others. It is sufficient however, that the letters are considered as unmeaning.

But the defendant contends that there is another ground of non-suit which the court must take notice of; for if the case were sent back, the motion might still be made on that ground; and if supportable, the court should determine it here and put an end to the litigation of the parties. It is that the action is misconceived; that it should have been trespass and not case; and this presents to the plaintiff an insurmountable difficulty. I lay it down as a general rule that where the act is illegal, and the injury proceeds directly from the act—trespass is the proper action; for although there is no actual force, yet in all illegal acts there is an implied force, and all illegal acts are *contra pacem*. Here the arrest was illegal; the process was irregular and void: the party is therefore entitled to his remedy: against whom shall he proceed? not against the officer, because he could not enquire into the regularity of the process. On its face, it appeared to be in usual form: he must then proceed to the source from whence the process proceeded, which is the plaintiff who caused the ca. sa. to issue. It is objected that he was not personally present; the act therefore as to him was not immediate; but the answer is, the execution is the instrument which inflicts injury, and the officer is the medium through which it passes. The defendant gave the impetus and he is constructively present. As in the case of the squib, or in the case of man who shoots from a house and hits another at the distance of 200 yards; though not on the spot, he sends a messenger who inflicts the injury, and the act as to him is immediate and direct. *1st Esp. Dig. part 2nd. p 193.* And the principle was decided in the case of *Kelly and Rembert; Ante 65*, and the case of *Parsons, vs. Loyd*; reported in 2nd Black. 845, but more at large in 3rd. Wilson, 371; is directly in point; in which all the Judges concur that trespass is the proper action. The motion for non-suit is therefore granted.

WILKS, & Co. vs. Jos. HASKET, et. al.

Defendant to a ca. sa. deposited in the hands of the sheriff the amount of the debts and costs, and took his receipt, stipulating to return the money, if an injunction to restrain further proceedings in the case should be obtained. The injunction was obtained and the sheriff returned the money. Rule against the sheriff for having failed to execute the ca. sa. discharged.

THIS was a rule against the sheriff, to shew cause why he had not executed and returned the ca. sa. The sheriff returned and shewed for cause, that the ca. sa. was "lodged in his office in January; that shortly after, the defendant, Joseph Hasket, arrived in the village, and finding that a ca. sa. was in the sheriff's hands against him, he deposited with him the amount of the judgment and costs, and took his receipt for the same, to be refunded, provided he obtained an injunction to restrain the proceedings in said case; that the said Jos. Hasket accordingly filed a bill in the court of equity, and on the 24th February, 1824, obtained an order that a writ of injunction should issue, to stay the proceedings at law in the case; that in pursuance of the above order, the sheriff was served with a writ of injunction, restraining all further proceedings under said ca. sa. that after he was served with the writ of injunction, agreeably to his accountable receipt, he delivered back to the said Joseph Hasket, the amount he had deposited in his hands." The sheriff further stated, "that he was prevented from proceeding under the ca. sa. by the aforesaid writ of injunction issued from the court of equity; so that in fact the money has never been collected in this case, and that at the time he delivered back the money to the defendant in the ca. sa. he took a bond, with Dr. Todd security, which he is willing to assign to the plaintiffs in this case." Upon hearing the rule and cause shewn, his honor granted the following order: "It is ordered that the rule be made absolute and that an attachment do issue against the sheriff, Allen Barksdale, esq. for the amount of the debt, interest and costs;" from which order the sheriff appealed and moved the constitutional court to reverse the order, on the following grounds:

WILKS, & Co. vs. HASKET.

1st. Because the money was not given to the sheriff in discharge of the debt, but only as security; and from the cause shewn thereon the rule ought to have been discharged:

2d. Because the sheriff was bound to obey the writ of injunction issued from the court of equity:

3d. Because if the sheriff acted improperly, the plaintiff should have proceeded against him by an action, and a rule ought not to lie, from the circumstances of the present case.

The opinion of the court was delivered by Mr. Justice Richardson.

According to modern practice, the process of attachment against the person of an officer of the court is often used as a remedy in order to obtain justice for an individual suitor. But still such process must be always founded upon a contempt supposed to have been committed by the officer towards the court; and generally, by neglecting to execute the lawful order of the court. The doctrine upon this subject has been well considered in the case of *The State, vs. the Sheriff of Charleston District*, 1 *Con. Rep.* p. 152, (see also the whole doctrine, with the authorities, all referred to in 1 *Bac. Abr.* 283; *tit. Attachment, A.*)

Now, wherein has the sheriff committed a contempt of the process of the court? He had in his hands a writ to take the body of Joseph Hasket, but omitted to do so, upon the assurance of Hasket and receiving security by money deposited, that he would sue out the process of injunction and arrest the writ. In complying with this request, the sheriff ran the risk of rendering himself personally liable, if Hasket should not obtain the injunction; but in bringing upon himself this risk, he cannot be said to have committed a contempt. He acted rationally, if well assured that the condition of the indulgence to Hasket would be fulfilled, and the event has justified his confidence, in as much as the injunction was obtained. Let us ask how the plaintiff would have been benefitted, if the sheriff had taken the body of Hasket? Had he done so, Hasket must have been discharged the moment that the injunction was lodged.

PORTER, *ads.* INGRAM.

with the sheriff; so that the plaintiffs situation is not altered in this respect.

But suppose even this point doubtful, or that the sheriff has rendered himself liable to the plaintiffs, neither of which questions would I anticipate, still as there is at least no direct contempt, and as the sheriff may raise some questions in his defence, or shew that Hasket was insolvent, by way of lessening the damages, he should have an opportunity of doing so, and the plaintiffs be left to their remedy by action at law; in which a jury would give damages commensurate with the injury actually sustained, by reason of any misconduct of the sheriff, and the harsh remedy by attaching the person upon a summary hearing, which is in the nature of a criminal proceeding, be avoided.

It is said that attachments for contempt are within the discretion of the court; and this is strictly true, where the contempt is clearly wilful, as for disobeying the order of the court and the like; but where the process of contempt is used in order to enforce justice between parties, as in the instance before us, it is to be considered as any other remedial process, the proper subject of appeal. The plaintiffs must therefore be left to their remedy at law, and the motion granted.

Johnson, and Colcock, Justices, concurred.

Irby. for motion.

O'Neal, contra.

CHARLES PORTER, *ads.* SAMUEL INGRAM.

When the premises of a deed of conveyance are complete and perfect and the habendum repugnant thereto, the habendum is void. Donor gives to his daughter a slave, by the premises of a deed, in the usual form, to have and to hold the said slave, after his (the Donor's) death: Held that the gift took effect in presenti.

THE plaintiff gave in evidence a bill of sale from Daniel Porter to Joseph Ingram, dated 1809, and a bill of sale from Joseph Ingram to plaintiff, dated 1810; together with possession from that time till shortly before the action was brought. The

PORTER, *ads.* INGRAM.

defendant gave in evidence a deed of gift from Daniel Porter, to his daughter Phebe Porter, wife of defendant, dated 1802, when Phebe Porter was a minor, living with her father Daniel Porter; which deed was duly executed, proved and recorded, and is in the following words:—"To all to whom these presents may come—I Daniel Porter of the State of North-Carolina and county of Anson send greeting:

Know ye that I the said Daniel Porter, for and in consideration of the natural love and affection which I have and bear unto my beloved daughter Phebe Porter, of the state and county aforesaid; and divers other good causes and considerations, me hereunto moving, have given and granted, and by these presents do give and grant unto the said Phebe Porter all and singular, one negro girl named Rose, to have, hold and enjoy all and singular the said negro girl Rose, *after my death*, to the said Phebe Porter, her heirs, executors and assigns, to the only proper use and behoof of her the said Phebe Porter, her heirs and assigns for ever; and I, the said Daniel Porter, all and singular the said negro girl Rose, to the said Phebe Porter, her heirs, executors and assigns, against all persons whatever, shall and will warrant and forever defend, by these presents. In witness whereof I the said Daniel Porter have herunto set my hand and seal, this 20th February 1802."

The court charged the Jury that the deed could have no operation before the death of Daniel Porter, and therefore was wholly testamentary.

The jury found for the plaintiff.

The defendant moved for a new trial, on the ground, that the charge of the Court was erroneous in point of Law.

The opinion of the court was delivered by Mr. Justice Huger.

The deed of gift to Phebe is formally drawn. The premises however appear to be at variance with the habendum. In the premises, Rose is given in presenti, the habendum is in futuro. When the premises, of a deed are not complete and perfect, resort must be had to the habendum to ascertain the intention of the parties. It may then limit or extend or even frustrate the premises. But when the premises are complete and perfect

PORTER, *ads.* INGRAM.

and the habendum is at variance with them, and they cannot stand together, the habendum is void. The first part of a deed has priority in law, as well as in fact, which is said not to be the case with wills, 3 *Dyer*, 272; 14 *Vin*, 51, 56, 100, 141, 145. If therefore the habendum to Phebe, after the death of the donor, be inconsistent with and repugnant to the gift in presenti, set forth in the premises, the habendum is void, and Phebe was entitled to Rose from the date of the gift. It is unnecessary in this case to determine whether the premises and habendum may not be reconciled, by regarding Phebe as taking Rose in trust for her father during his life and to her own use after his death; in either case, she is now entitled to Rose, if the deed was not fraudulent and Rose was delivered in conformity to its provisions. The motion for a new trial is therefore granted.

NAMES

OF

C A S E S

REPORTED IN THIS VOLUME.

Acock, <i>vs.</i> Linn & Lansdown,	368
Aiken, <i>vs.</i> Jones,	69
Attaway, <i>ads.</i> James, adm'r.	438
Barkley, <i>ads.</i> Barkley,	441
Barksdale, <i>vs.</i> Toomer,	290
Barnes, & Co. <i>vs.</i> Shelton,	83
Bates, <i>ads.</i> Martin,	17
Black <i>vs.</i> Black,	412
Black, <i>vs.</i> Erwin,	411
Blackwood & Brennan, <i>ads.</i> Le-	
man,	219
Birchmore, <i>vs.</i> Broughton,	300
Bratton, <i>vs.</i> Clendenin,	454
Brennan, & M'Creary, <i>vs.</i> M'Le-	
more,	74
Brown, <i>vs.</i> Duncan,	337
Brown, <i>vs.</i> Fausett, & others,	81
Calder, <i>vs.</i> Delessieline,	186
Campbell, <i>vs.</i> Morse,	468
Canty, sheriff, <i>vs.</i> Duren & Beck-	
ham,	434
Carsten, <i>vs.</i> Murray,	113
Cates, <i>vs.</i> Cureton,	400
Chappell & Curston, <i>vs.</i> Proctor,	49
Charleston & Columbia Steam-	
Boat Company, <i>ads.</i> Bason,	262
City Council of Charleston, <i>ads.</i>	
Weston, and others,	340
Clarkson, <i>vs.</i> Canty,	812
Cleveland, <i>vs.</i> D're,	407
Cloud, <i>vs.</i> Sledge,	367
Corrie, <i>vs.</i> Jacobs, and others,	326
Counts, <i>vs.</i> Bates	464
Croxton, & Co. <i>vs.</i> Addison,	72
Davis, <i>vs.</i> Miller,	398
DeGraffenreid, <i>vs.</i> Gregory,	443
Delessieline, <i>ads.</i> Bunch,	226
— — — — —, <i>ads.</i> King & Jones,	357
Depau, Deas & Co. <i>ads.</i> Ex'rs.	
Brown,	251
Drummond, <i>vs.</i> Hyams,	268
Duggan, <i>vs.</i> England,	215

Duncan, <i>vs.</i> Gadsden,	354
Duncan, <i>ads.</i> Markley,	296
Dunn, <i>vs.</i> City Council of	
Charleston,	189
Dupree, <i>vs.</i> Harrington,	391
Ellison, <i>vs.</i> Gordon,	436
— — — — —, <i>vs.</i> — — — — —, as Ex'or,	<i>ib.</i>
Farrand, <i>vs.</i> Bouchell,	83
Farrow, <i>vs.</i> Martin,	409
Fowler, <i>vs.</i> Word,	372
Gains, <i>vs.</i> Downs,	72
Gazaway, <i>vs.</i> Moore,	401
Gibson, <i>ads.</i> Chappell,	28
Glenn, Trustee, <i>vs.</i> Lopez,	105
— — — — —, ex'or. of <i>vs.</i> M'Cal-	
lough,	484
Glover, <i>ads.</i> Adm'r. Miller,	267
Gourdine, <i>vs.</i> Fludd,	232
— — — — —, <i>ads.</i> The Heirs of	
Barino,	221
Gray, <i>ads.</i> Young,	38
Admr. of Happoldt, <i>vs.</i> Jones,	109
Gregory, <i>vs.</i> Williams,	417
Griffin, <i>vs.</i> Wardlaw,	481
Guignard, <i>vs.</i> Glover,	457
Halls, Kirkpatrick & Co. <i>vs.</i>	
Thomas W. Howell,	426
— — — — —, <i>vs.</i> Arthur Howell,	<i>ib.</i>
Harman, <i>vs.</i> Gartman,	430
Haviss, <i>vs.</i> Barkley, Sheriff,	63
Hinds, <i>ads.</i> Adm'r. David,	423
Holmes, <i>vs.</i> Hard,	133
Hopkins, <i>vs.</i> Myers,	56
Houston, <i>vs.</i> Frazier,	10
Huntington, <i>vs.</i> Shultz &	
M'Kenna,	452
Jones, <i>ads.</i> Mickle,	419
Jones, <i>ads.</i> Postell & Potter,	92
Johnson, <i>vs.</i> Gaither,	6
Keckley, <i>ads.</i> Cummins & Keith,	262
Kennedy, <i>ads.</i> Garlington,	424
Lahiff & Lahiff, <i>vs.</i> Hunter,	184

NAMES OF CASES.

Lester, <i>ads.</i> Martin,	17
Long, <i>vs.</i> Kinard,	47
Loomis & Co. <i>vs.</i> Pearson & M'Michael,	470
P. & M. Love, <i>vs.</i> Dennis,	79
Lyles, Exr. of Sims, <i>vs.</i> Sims,	42
Lyles, Ordinary, <i>vs.</i> Brown Admx. of Brown,	31
Lynah, <i>vs.</i> Commissioners Roads for St. Paul's Parish,	330
Magwood, <i>ads.</i> Legge, Admx. of Packrow,	116
Mairs and others, <i>vs.</i> Smith,	123
Malcomson, <i>vs.</i> James, Admr. of Ferrell,	7
Martin, <i>vs.</i> Mitchell & Davis,	445
—, <i>vs.</i> Simpson,	454
Marshall, <i>ads.</i> White,	122
M'Cool, <i>vs.</i> M'Cluny,	488
Means and others, <i>vs.</i> Moore,	314
Merritt, <i>vs.</i> Williams,	306
M'Fall, <i>vs.</i> Sherrard,	285
Miller, <i>vs.</i> Langton,	131
—, <i>vs.</i> Steen,	388
Mitchell, <i>vs.</i> DeGraffenreid & Moorman,	451
—, <i>vs.</i> Parham & Davis,	3
—, <i>vs.</i> Humphries & Dawkins,	479
M'Kenna, <i>vs.</i> Commissioners of Roads for Lancaster Dist.	381
M'Mullin & wife, <i>vs.</i> Brown,	76
Morrison, <i>ads.</i> Barksdale,	101
Moyer, <i>vs.</i> Folk & Folk,	50
Neyle, <i>ads.</i> Chisolm & Taylor,	274
Newcomb, <i>vs.</i> Niel,	355
Nichols, <i>vs.</i> Artman,	274
Nicks, Admr. of Fair, <i>vs.</i> Martin dale,	135
Owens, <i>vs.</i> Ford,	25
Ordinary of Charleston District, <i>vs.</i> Ex'ors Cudworth,	287
—, <i>vs.</i> Stevens,	16
Page, <i>vs.</i> Loud,	269
Parravicene, <i>vs.</i> Schwartz,	224
Payne, <i>vs.</i> Kershaw,	275
—, <i>ads.</i> Robinson,	279
Price, <i>vs.</i> Ex'ors. Zimmerman,	305
Porteous, <i>vs.</i> Hazell & Jenkins,	332
Porter, <i>ads.</i> Ingram,	492
Price, <i>ads.</i> Justrobo,	111
Ramey, <i>vs.</i> Marsh and others,	472
Reed, <i>vs.</i> Price,	3

Rembert, <i>ads.</i> Kelly,	65
Rice, <i>vs.</i> Hancock,	393
—, <i>ads.</i> Spear & Galbraith,	20
Richardson, <i>ex.</i> parte,	308
Robinson & others, <i>ads.</i> Carwile,	85
Rogers, <i>ads.</i> Norton,	5
Sargeant, <i>vs.</i> Hembold,	219
Satterwhite's adm'r. <i>vs.</i> M'Kie,	397
Simpson, <i>ads.</i> Kennedy,	370
Sims, <i>vs.</i> Saunders,	374
Singleton, <i>vs.</i> Bremar, Admx. of Bremar,	201
Slack, <i>vs.</i> Littlefield,	296
Smith, <i>vs.</i> Goggans,	62
—, <i>vs.</i> Lyons,	334
State, <i>vs.</i> Council,	53
—, <i>vs.</i> Petty,	59
—, <i>vs.</i> Harrison,	88
—, <i>vs.</i> Seaborn,	90
—, <i>vs.</i> Crosby,	139
—, <i>vs.</i> Huggins,	183
—, <i>vs.</i> Larumbo,	302
—, <i>vs.</i> M'Kennan,	319
—, <i>vs.</i> Durant,	414
—, <i>vs.</i> Sotherlin,	23
Stephenson, <i>vs.</i> Hillhouse,	439
Stephens, <i>vs.</i> Ligon,	403
Stewart, <i>vs.</i> Fowler,	156
Stoney, <i>vs.</i> M'Niel,	389
Tollison, et al. <i>ads.</i> Miller, Treasurer, <i>vs.</i> M'Guire,	474
Union Bank, <i>vs.</i> Geo. & Wm. Hall,	245
Union Insurance Company, <i>ads.</i> Stoney,	235
Vaughn & M'Lauchlin, <i>ads.</i> Dinkins,	26
Volentine, <i>vs.</i> Bladen,	9
Wadsworth, <i>vs.</i> Griswold,	17
Wallis, <i>vs.</i> Nelson,	144
Watson, <i>vs.</i> Williams,	447
Walker, <i>vs.</i> Harshaw,	45
C. & J. T. Weyman, Ex'or. & Ex'rs. of Gale, <i>vs.</i> Murdock, Ex'r. of Miller,	125
Wiggins, <i>vs.</i> Hunter,	80
Wilks & Co. <i>vs.</i> Hasket,	490
Wilbourn, <i>vs.</i> Parham,	375
Willinck, <i>vs.</i> Davis,	264
Wilson, <i>vs.</i> Miller,	437
Witherspoon, <i>vs.</i> Dunlap,	390
Whelloch, <i>vs.</i> Bobo,	421

INDEX TO VOL. I.

ABATEMENT.

See Replevin, 1.

ACTION.

1. Action for the breach of warranty of the soundness of a horse, for the purchase money of which a negotiable note had been given. Held that the action might be maintained, though the note had not been paid.—*Wiggins, vs. Hunter,*

AMENDMENT.

See Verdict, 1.

ARREST.

See Practice, 13.

ARREST OF JUDGMENT.

See Pleas and Pleading, 2. Indictment

ASSIGNMENT.

1. Defendant having lodged two notes of hand with an attorney for collection, by a separate writing assigns them with other choses, in payment of a debt, and transfers the attorney's receipt for the notes, with an order written thereon, to pay the proceeds when collected, to the assignee. The plaintiff's attachment being afterwards issued and served on the attorney, as garnishee, it was held that the assignment was valid, and the monies collected not liable to the attachment.—*Wadsworth, vs. Griswold,*
2. A person who is in possession of a bond, assigned in blank, is in law, prima facie, the owner, and the obligor making payment to such holder, bona fide, will be discharged.—*Stoney, vs. M'Niel,* 156
3. Any evidence which went to shew that the payment was made bona fide, should have been admitted; without regard to the intention of the obligee, at the time of making the assignment. *Id.*

4. A note of hand not negotiable, cannot, under the act of the legislature of 1798, be transferred verbally or by delivery merely.

Smith, vs. Lyons,

334

5. Bond for the prison bounds is assignable under the act.—*Tollison, vs. Miller,*

322

ATTACHMENT.

See Practice, 3.

- 80 1. Process by attachment will not lie against an absent executor or administrator.—*Weyman, vs. Murdock,*

122

2. An action for slander cannot be instituted by process of attachment.—*Sargeant, vs. Hembold,*

219

AUCTION.

See Interest, 2.

AUTHORITY.

1. He who does an act, which he cannot do effectually but by virtue of an authority, shall be taken to have acted in execution of his authority.—*Magwood ads. Legge.*

116

2. An executor, authorized by will to sell lands, cannot make an attorney to convey; if one have a bare authority, coupled with a trust, he cannot act by attorney.—*Black, vs. Erwin.*

411

BAIL.

See Witness 1.

17 BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Evidence 3.

1. Note of hand, after due, endorsed 1st. Nov. 1819. At the time of endorsement, endorser informed that immediate demand would not be made of drawer; and promised himself to write to drawer and inform him. Demand made of drawer, residing in Georgia, about the 10th December. Held that demand

INDEX.

was made in sufficient time. Indulgence given to drawer after demand, on his promise to pay; and suit afterwards brought against him. Notice of non-payment given to endorser, March, 1820. Held that endorser was discharged on account of the credit given to drawer, and for laches in giving notice to endorser. No sufficient evidence of a promise to pay, after notice of dishonor; which must be explicit and clearly proved.—*Houston, vs. Frazier.*

2. As between the original parties to a promissory note, it may be proved to have been given without consideration, though expressed to be "for value received," and if so proved, it is *nudum pactum*.—*Singleton, vs. Bremar,* 201

3. Bill of exchange, payable after sight, and dated 20th June, drawn by Deft's in Charleston, on W. of New-York: The first bill of the set, which had been sent by Post, directed to the payee in New York, was presented by a person unknown, with the name of the payee endorsed, but not in his hand writing; accepted 1st July, and at maturity paid: After the payment, the second of the set was presented by the payee, protested for non-acceptance 31st. of August, and for non-payment 18th Sept. and notice given to drawers: In an action on the second bill against the drawers, a verdict was found for plaintiffs and a new trial refused.—*Depau, Deas & Co. ads. Ex'rs. Browne,* 251

4. The Notary of the branch bank in Columbia, on the day that a note discounted in Bank became due, deposited a letter in the post office, directed to the drawer who resided in the country, demanding payment; and testified that it was the practice of the bank to make demands in this way: Held not a sufficient demand of the drawer, to charge the endorsers.—*Halls, Kirkpatrick & Co. vs. Howell,* 426

BOND.

See Assignment, 2, 3, 5. Time, 2.

COMMISSIONER OF SPECIAL BAIL.

1. Under the Prison Bounds Act, the commissioner of special bail, has only power to discharge, if no sufficient cause be shown, for disbelieving the prisoner's oath or affirmation: if such cause be shown, he has no power to decide that the oath is false; nor can his finding to that effect, be given in evidence in a suit on the bond for the bounds.—*Robinson, ads. Carwile,* 35

COMMON CARRIER.

1. The Steam Boat of defendants, going through an inland passage to Charleston, grounded from the reflux of the tide, in consequence of which she fell over, the bilge water rose into the cabin and injured a box of books belonging to plaintiff. Held that defendants were liable for the loss so occasioned.—*Charleston and Columbia Steam Boat Co. ads. Bason,* 262

2. The waggon of defendant, in which he was carrying goods for hire, stuck fast in fording a creek, and the water rising suddenly, damaged the goods: Held that defendant was liable for the damage so occasioned.—*Campbell vs. Morse,* 468

CONDITION OF BOND.

See Location 6. Practice 15.

CONSIDERATION.

1. Past cohabitation is not a good consideration to support a promise.—*Singleton, vs. Bremar,* 201

CONSTITUTIONAL LAW.

1. The Legislature may constitutionally impose a rate of interest, higher than the rate generally established, on tax collectors who fail to pay over public monies in their hands, at the times required by law.—*State vs. Harrison, State, vs. Seaborn,* 88

INDEX.

2. The act of the legislature, of 1817, authorizing the City Council of Charleston, for the purpose of widening the streets, to cause "lots" to be assessed, and to take them at the assessed value, only relates to such portions of land as shall be actually necessary for the street.

If so construed as to give the council the power of taking more, the act would be unconstitutional.—*Dunn, vs. City Council*,

3. A tax imposed by the City council of Charleston upon the six and seven per cent stock of the United States, held not to be repugnant to the constitution of the United States.—*City Council, ads. Weston*,

4. In 1801, W. B. and J. S. the owners of the land on which the present village of Lancaster is situated, petitioned the legislature that a village might be laid out and established; by a resolution of the legislature, this was ordered to be done and a plat of the village to be returned: By an act of 1820, the commissioners of roads were directed to open the streets of the village, according to the original plan; which they proceeded to execute: Plaintiff, who had been in possession of the land over which the streets were attempted to be opened, and who derived his title from W. B. and J. S. declared in prohibition against the commissioners, who pleaded the act of 1820, and that they acted in conformity thereto: Plaintiff replied that there was no original plan of the village: upon proof of the existence of such plan and verdict of a jury to that effect, prohibition dismissed.

The act of 1820 was no violation of the constitutional right of plaintiff.—*M'Kenna, vs. Commissioners of Roads*.

CONSTRUCTION.

See *Devise*, 1, 2. *Constitutional Law*, 2.

1. Defendant endorsed a note of hand, drawn by Robert Ogden, in these words, "the within amount I promise to pay, when in funds belonging to Robert Og-

den, the period not to exceed six months;" construed a promise to pay, if within six months, defendant should have funds of Ogden in his hands; and the fact of his having such funds, within that period, not being averred nor proved, held that the action would not lie.—*Duncan, vs. Gadsden*,

361

CONTINUANCE.

See *Practice*, 8, 9.

- 189 1. The granting of a continuance, is a matter for the discretion of the judge before whom the cause is brought.—*Price, ads. Justrobe*,

111

CONTRACT.

1. Plaintiff agreed to sell and delivered a horse, with a stipulation that the right of property should not pass to the vendee, until half the consideration should be paid; held that until such payment made, the horse remained plaintiff's.—*Dupree, vs. Harrington*,
- 340 2. Defendant by a written agreement, engaged "to meet" plaintiff, and make him title to a tract of land; a time and place of meeting were appointed, and defendant attended accordingly; held, that plaintiff, having failed to attend at the time and place, and not having demanded title at any other time, could not sustain the action for breach of the contract.—*Farrow, vs. Martin*,
- 391 3. Assumpsit on an agreement not sealed, otherwise in the form of a bond for observing the rules, under the prison bounds act: Demurrer sustained; the security required by that act is a bond.—*Canty, vs. Duren & Beckham*,
- 409 435

COSTS.

See *Executors and Administrators*, 3.

1. Under the act of 1821, suggestions were filed against judgments, before confessed; which on being called, were dismissed by the Judge of the Circuit Court. The defendants to the suggestions, thereupon, entered up judgments as of non-suit, and issued executions for costs. These executions, on motion before a

INDEX.

- Judge at Chambers, were ordered to be set aside, and on appeal, it was held that the defendants were not entitled to costs.—*Lester, ads. Martin; Bates, ads. Martin,* 17
2. The clerk of the court may issue execution for his costs, against the party liable to pay them, whenever the suit is settled or determined, though no judgment be entered up in the cause. *Corrie, vs. Jacobs,* 326
3. But unless he have previously delivered to the party an account of the particulars and amount of fees charged, the execution is irregular and will be set aside on motion. *Ib.*
4. No costs are allowed on such executions, except two and a half per centum, commissions on the amount collected, to the sheriff *Ib.*
5. In an action of trover, the value of the property was alleged to be within the summary jurisdiction of the court, but the damages laid above it: verdict five dollars: held that by the express terms of the act of 1799, plaintiff in trover is entitled to full costs, when the verdict exceeds four dollars. *Cloud, vs. Sledge,* 367
6. When a statute gives double costs, the rule of taxation is to allow, first, common costs and then add one half of that amount. *Stephens, vs. Ligon,* 439
7. Witness attending court, served with a subpoena ticket, no writ of subpoena having issued, is entitled to no more than 2s. 4d. per day.—*Bratton, vs. Clendenin,* 454
8. By agreement of counsel, commission to take testimony was issued, to be used in several cases: held that the costs of it could be taxed but in one of the cases.—*Ramsay & others, vs. Marsh and others,* 472
9. Costs of "special matter and argument" allowed in cases where the issues were made up, though afterwards discontinued. *Ib.*

COVENANT.

See Pleas and Pleading, 4.

DAMAGES.

See New Trial, 1.

1. In no case where the action of assumpsit is for work and labor, &c. where the nature of the contract furnishes the standard of assessment, can the jury allow arbitrary damages.—*Farrand, vs. Houchell,* 33
2. A note for the delivery of twenty-five barrels of rice, at one dollar and twenty five cents, per cwt: Held that the measure of damages, in an action brought, was the actual value of the rice, on the day appointed for the delivery.—*Price, ads. Justrobo,* 111
3. In an action on the case, for damages occasioned by a public nuisance, damages sustained since the bringing of the action, are not recoverable.—*Duncan, ads. Marhley,* 278
4. In an action for trespass and taking away property, the jury were bound to find damages, at least to the value of the property taken.—*Porteous, vs. Hazel & Jenkins,* 333

DEPUTY.

See Evidence, 13.

1. Defendant, at his own instance, undertook to arrest a party, on a bail writ; being authorized by a special deputation for that purpose. He did so, in presence of plaintiff's agent, and afterwards suffered the party to escape, and neglected to retake him, though he might have done so. Held that defendant was liable to the same extent as the sheriff would have been, and was guilty of gross neglect.—*Stephenson, vs. Hillhouse,* 23
2. A deputy sheriff, executing process, is authorized to take bail.—*Delessieline ads. Bunch,* 226

DEVISE.

1. Testator, by his will, gives land to his son "and his heirs forever." A tract of land to his daughter "and her heirs forever." And the will goes on to give to the son and daughter, jointly, and their heirs, four slaves; "the said negroes not to

INDEX.

be divided till the said W. M." (the son) "arrives to the age of twenty-one years. If either of the said" (son or daughter,) "shall de cease before the age of twenty-one or marriage, leaving no heir lawfully begotten, the moiety of the deceased shall revert to the survivor; if both shall de cease, leaving no heir as above mentioned, then the said property shall revert to my father." Held that the limitations related only to the slaves.—*M. Mullin vs. Brown.*

2. A tract of land was granted to the father of testator's former wife, in 1794; which testator acquired by his marriage. Testator afterwards purchased a tract of land, held by an older grant, which was said to cover part of the same land. He devised to his daughter, T. "two hundred and sixty-one acres" "being land given to him with his former wife." More than 261 acres was included in the tract which testator acquired by his wife, independently of what was covered by the older grant. Held that T. took no part of the land which was within the older grant.—*M. Mullin, vs. Brown.*

DISTRESS.

1. The stat. of 8 Anne, C. 14, authorizing lessors to distrain, for rent in arrear, on goods which have been clandestinely removed from the demised premises, within five days after their removal, does not relate to goods which were removed before the rent became due.—*Brown, vs. Duncan.*

DISCOUNT.

See Sell Off.

ELECTIONS.

See Sheriff, 2, 5.

ENDORSER.

See Bills of Exchange and Promissory Notes, 1, 4.

1. The holder of a promissory note, accepting a dividend of an insolvent drawer's effects and releasing him, with the consent of the endorsers, does not thereby discharge the endorsers.—*Union*

Bank, vs. George & Wm. Hall, 245

2. The insolvency of the maker of a promissory note, does not dispense with the necessity of giving notice of his default, in order to charge the endorser.—*Page, vs. Loud, 268*

ESTOPPEL.

See Evidence, 15, 25, 26. Landlord & Tenant, 1, 2.

EVIDENCE.

See Usury, 2 See Witness, Summary Process.

- 76 1. Note of hand given for two clocks. In a suit on the note, parol evidence offered to shew an agreement that one of the clocks might be returned if disapproved of: Held that this evidence was admissible, as establishing a set off, and did not go to alter the terms of the note.—*Barnes & Co. vs. Shelton.*

38

2. In an action for the breach of warranty of the soundness of a slave, the declarations of the slave, by which disease was detected, were held admissible evidence; as inducement, and from the necessity of the case.—*Gray, ads. Young,*

38

- 76 3. It is not necessary to prove a consideration, though the words "value received," be not contained in the note.—*Chappell & Cureton vs. Proctor.*

49

4. In a prosecution for the forgery of a bank note, an officer of the bank ought to have examined, to prove that the note was forged.—*State, vs. Petty,*

59

5. Evidence of the prisoner's having had in his possession other notes supposed to be forged, was properly admitted to shew his knowledge that the note passed by him was a counterfeit.—*State, vs. Petty,*

59

6. Office copy of a deed to R. C. under whom plaintiffs claimed, executed in 1762, and soon after recorded, was properly admitted in evidence, upon proof that search had been made among the papers of R. C. and in the office where the deed was recorded; and that R. C. and those claiming under him, had been in possession of the land conveyed ever since.—*M. Mullin, vs. Brown,*

76

INDEX.

7. Defendant, who was confined in jail, on a recovery in an action on the case, petitioned for the benefit of the Insolvent Debtors' Act. Held that no other evidence than the record itself could be received, to shew the nature of the trespass, for which the recovery was had.—*Glenn, vs. Lopes,* 106
8. The possession of orders drawn by the defendant, for goods, were not sufficient evidence of the delivery of the goods; the plaintiff being a merchant and presumed to keep regular books.—*Price, ads. Justrobe,* 111
9. In an action of trespass to try title, on writ of enquiry, defendant was not allowed, in mitigation of damages, to give evidence of his having been put in possession of the premises, by the verdict of a jury, on a trial for forcible entry:—*Lahiffe & Lahiffe, vs. Hunter,* 184
10. Nor that since the bringing of the action, he had been appointed guardian of the person and estate of one of the plaintiffs.—*Lahiffe & Lahiffe, vs. Hunter.* 16.
11. Letters, which were received through the Post-Office, may be submitted to the jury, to infer whether they were written by the direction of the plaintiff, who cannot write, on internal evidence; such as that they state facts which could only be known to the plaintiff, or contain many circumstances which could relate to no other person.—*Singleton, vs. Bremar,* 201
12. Copies of grants and plats, certified by the deputy secretary of state and deputy surveyor-general, are admissible in evidence, without proof of the appointment of those deputies, or that they have in other instances acted in those capacities.—*Gourdine, ads. Heirs of Barino,* 221
13. In an action against the sheriff, for the mis-feazance of his deputy, the admission of the sheriff is sufficient evidence of the deputation; it is not necessary to prove a written deputation or special warrant.—*Delessienne ads. Bunch,* 226
14. Shoemaker's book, to which entries were transferred from a slate, without proving who made the entries on the slate, or that they were regularly transferred, not admissible.—*Drummond vs. Hyams,* 258
15. The land in dispute had been sold to defendant by the Sheriff, under a judgment and execution against one Philips, in 1813. Plaintiff relied on a recovery against Philips, of the same land in 1815. Held that the record of recovery was not conclusive against defendant, who might shew title in himself, and that the recovery was fraudulent.—*Simson, ads. Kennedy,* 370
16. Plaintiff having given inconclusive testimony of a parol gift and delivery of a slave, introduced the subsequent declarations of the donor, to establish that he had given; held that on the part of defendant, the subsequent acts and declarations of the donor were properly received in evidence, to shew that he had not given.—*Sims, vs. Saunders,* 374
17. Defendant gave plaintiff a note for \$80, "for the hire of his negro man A." Held that it was not competent for plaintiff to prove a verbal stipulation to pay an additional sum, if cotton should bear a certain price.—*Gazoway, vs. Moore,* 401
18. Allegation of a summary process, that parties subscribed an agreement, with their own proper hands, was supported by proof that one of them subscribed by his agent.—*Boulware, vs. McComb,* 461
19. Plaintiff offered in evidence transcripts properly attested, of proceedings in the County and Superior Courts of North-Carolina, containing a writ, several interlocutory orders, continuances, memorandum of a verdict and "judgment affirmed," and execution at length; but no contract or cause of action was set forth: Held that these transcripts should have been received as evidence of a judgment.—*Gregory, vs. Williams,* 417

INDEX.

20. Plaintiff also offered a copy of a bond, attested by the clerk of the county court, as the cause of action on which the proceedings were founded; no connection between them appearing on the transcripts: Held inadmissible. — *Gregory, vs. Williams*, 417
21. Defendant, by his assignment of a sealed note, engaged "if not good, to make it good;" after judgment against the obligor and fi. fa. returned nulla bona, it was held that other evidence than the return of a ca. sa. was sufficient to establish the fact of the obligor's insolvency.—*Wilson, vs. Miller*. 437
22. Trespass for the taking of a slave: defendant justified as having the right of property, and offered in evidence a letter written by a former owner of the slave, acknowledging that he had sold to defendant. Held that the letter was incompetent, as the declaration of a third person, between whom and plaintiff there was no privity.—*Watson, vs. Williams*, 447
23. The return of "nulla bona" to an execution against the administrator of a deceased sheriff, is sufficient, under the act of 1795, to sustain a suit on the sheriff's bond, against his sureties.—*Treasurer, vs. M'Guire*, 474
24. The entry of the word "satisfied" by the sheriff on an execution, is sufficient evidence of his having received the money which it commands to be made. —*Treasurer, vs. M'Guire*, 474
25. It was proved on the part of the plaintiff that defendant went into possession of the land in dispute under I. P. by whom it had been mortgaged; that the mortgage was foreclosed in equity, the land sold under decree, and purchased by plaintiff. Held that plaintiff was not bound to shew a grant from the state, or any other title, as against defendant.—*Griffin, vs. Wardlaw*, 481
26. It was incompetent for defendant, in this action, to shew that the mortgage on which the decree had been obtained, was fraudulent.—*Griffin, vs. Wardlaw*, 481

EXECUTION.

See Irregularity. Interest, &c.

EXECUTORS AND ADMINISTRATORS.

1. Defendant purchased corn of a widow who remained in possession of her deceased husband's effects, without having been appointed executrix or administratrix. It did not appear that he was apprized of her want of authority. Held that defendant was not liable, as executor *de son tort*.—*Johnson, vs. Guither*, 6
2. An Executrix having a right to the possession of an estate for life or widowhood, purchased slaves with the mesne profits. Held that they were her individual property, and not a part of the estate, and this notwithstanding her declarations that they were purchased for the estate.—*Lyles, vs. Sims*, 42
3. The defendant, an administrator, pleaded *non assumpsit* and *plene administravit præter*. Issue on the first plea, found against him. Held that defendant was liable to costs, *de bonis propriis*. Administrators are so liable when they plead a plea which is found against them, or is untrue in fact. *Smith, vs. Goggans*, 52
4. H. H. executor of S. P. deceased, but who was not shewn to have ever proved the will or qualified, sold a slave belonging to his testatrix's estate, to defendant, "his executors, administrators, and assigns forever;" but did not style himself executor in the bill of sale. By the will of testatrix, the "annual income" of the property was given to the executor, H. H. in remainder, expectant on the death of a third person without issue. Held that H. H. had full power to sell as executor, though he had never proved the will nor qualified; and having no power to sell as legatee, he should be taken to have sold as executor, though he did not so style himself in the bill of sale. He who does an act which he cannot do effectually, but by virtue of an authority, shall be taken to have acted in

INDEX.

- execution of his authority.—*Magwood, ads. Legge,* 116
5. An executor authorized by the will to sell lands, cannot make an attorney to convey.—*Black, vs. Erwin,* 411
6. An infant purchased a horse, for which he gave promissory notes: *Held* that the infant's administrator might plead the infancy of his intestate, and that his selling the horse, as a part of his intestate's estate, was no confirmation of the purchase, so as to render the administrator liable for the value.—*Couns, vs. Bates,* 464
- FACTOR.**
See Interest, 3.
- FAILURE OF CONSIDERATION.**
1. Action of debt, on bond given for land. Defence, title not in plaintiff and unsatisfied judgments against him, at the time of sale.
Held that proof of a third person, whose descendants are living, having been many years ago in possession of the land, long enough to acquire a title by the statute of limitations, without shewing the extent of such possession or claim, was not sufficient to establish the defence.
Defendant having since his purchase been in possession long enough to acquire a title by the statute, could not avail himself of such defence.
Unsatisfied judgments against plaintiff at the time of sale, did not constitute such a defect of title as would be a defence to the action.—*Gourdine, vs. Fludd,* 232
2. Deed to defendant describes the land as "that plantation, or tract of land, situate in Christ Church Parish, about eight miles from Hibben's Ferry, now in the possession of the said A. V. T." (the defendant) "containing nine hundred and eighty six acres, be the same more or less." On resurvey, the tract was found to contain about one hundred acres less than the quantity expressed in the deed. In an action on the bond given for the purchase money, it was held that defendant was not entitled to a deduction for the quantity of land deficient.—*Barksdale, vs. Toomer,* 297
3. Plaintiffs were the children of T. B. deceased, who by his will directed lands to be sold by his executors, for partition amongst his children: the executors agreed to sell certain of the lands to defendant and gave bond to make him titles, and defendant with their consent gave notes to the plaintiffs, for the amount to which they would be respectively entitled, out of the proceeds: *Held* that defendant, in actions on these notes, could not set up in defence the failure of the executors to make him titles, according to the condition of their bond.—*Black, vs. Black,* 412
4. Land was sold by the sheriff, by order of court, to effect a partition; held, that in an action on the bond given for the purchase money, the purchaser might set up by way of discount, a deficiency of the quantity which the land had been represented to contain.—*Barkley, vs. Barkley,* 441
- FEE SIMPLE CONDITIONED.**
1. Though tenant of fee simple conditional may, after the existence of issue, alien; yet a devise is not an alienation within the meaning of the law. If such alienation do not take effect in the life time of the tenant, the estate must descend to the heirs of limitation, *per formam doni*.—*Jones, ads. Postell & Potter,* 32
- FREE NEGROES.**
1. Free persons of color are entitled to the benefit of "the Prison Bounds Act."—*Rodgers, ads. Norton,* 5
2. W. H. residing in Virginia, by his will directs his negro slave, C. to be free after the expiration of his apprenticeship. To this the executors assent, the estate being, independently of this property, solvent; and C. is suffered to go at large as a freeman. C. is afterwards levied upon and sold, under a si. fa. against the executors of W. H. *Held* that the sale was void and C. entitled to his freedom.—*Rice, ads. Spear & Galbreath,* 20

INDEX.

3. A free person of color receiving the benefit of the insolvent debtor's act, must take the oath which it prescribes.—*Glenn, vs. Lopes,*

105

FRAUD.

1. One I. A. the brother of defendant, placed in his hand funds for settling his (I. A.'s) debts on the best terms he could: defendant called on plaintiff, to whom I. A. owed \$65, and representing the debt as doubtful, obtained a discharge on paying \$33: Held no ground to charge defendant, who only acted as agent, with the balance of the debt.—*Allaway, ad. James,*

438

GRANT.

1. Defendant first surveyed the land in dispute and within six months obtained a grant. Plaintiff afterwards surveyed the same land, and within six months from the date of defendant's survey, took out a grant which was prior in date to defendant's: held that plaintiff's grant was null and void.—*DeGraffenried, vs. Gregory,*

413

INDICTMENT.

See Misdemeanor.

1. Prisoner indicted under the Act of Assembly, 1776, 7, for forgery, and passing a forged bank note. The charge in the indictment, is "did dispose of and put away:" the words of the act, "utter and publish." Judgment arrested. The words of a statute, describing an offence, should be pursued with the utmost exactness.—*State, vs. Pelly,*
2. The indictment charged the defendant with having committed perjury, by swearing at a court in July, that he had witnessed a transaction in October of the same year. Held not to be a repugnancy nor to afford cause for arresting the judgment.—*State, vs. McKennan,*

59

302

INFANCY.

See Parent and Child, Executors and Administrators, 6.

INSOLVENT DEBTORS' LAW.

See Evidence, 7.

1. The provision of the *Prison bounds act*, excluding from its benefits persons "seen without the walls," or "without the rules," extends to applicants for the benefit of the *Insolvent Debtors' Act*.

Glenn, vs. Lopes,

105

2. Merely being seen without the walls, does not exclude from the benefits of the act. The test is, whether defendant's being without the rules, was voluntary; or the result of causes which he could not control.

Id.

3. A free person of color receiving the benefit of the act, must take the oath prescribed by it. *Id.*

4. Petitioner for the benefit of the "Insolvent Debtors' Act," caused her goods to be secretly removed, with intent to defraud her creditors. They were afterwards recovered by the creditors and sold for their benefit. Held that the attempt to defraud did not deprive her of the right to the benefit of the act.—*Mairs and others, vs. Smith,*

128

INSURANCE.

1. Insurance on a vessel "at and from Charleston to Marseilles, and at and from thence to Havana." A separate policy on the cargo, executed the same day "from the loading thereof at Charleston." In the offer of plaintiffs, on which both policies were effected, every material circumstance was said to be disclosed. In fact the vessel had been laden at Havana, and had touched at Charleston; the goods were not landed in Charleston, and the manifest shewed that they were shipped in the names of Spaniards. Held that the omission to disclose these facts, (Spain and her colonies being at war,) was such a concealment of material circumstances, as vitiated the policy on the vessel.—*Union Insurance Co. ad. Stoney,*

235

INTEREST.

1. Interest is not allowed on a demand for work or labor done.

INDEX.

goods sold, or any other account not liquidated in writing, even though the money be payable at a day certain.—*Farrand vs. Bouchell*,

2. In an action for refusing to comply with the terms of a sale at auction, the jury may allow as damages, the difference between the sale and re-sale and interest thereon

The auctioneer may be considered the agent of both parties, and his entry a liquidation of the demand—*Blackwood and Brennan*, ads. *Leman*,

3. The balance of a factor's account, struck after the termination of dealing with his principal, does not bear interest.—*Neyla*, ads. *Chisolm & Taylor*,

4. The interest which has accrued on a senior execution, subsequently to the date of a junior execution, must be paid, before any part of the money collected can be applied to the satisfaction of the junior execution.—*Clarkson, vs. Canty*,

IRREGULARITY.

See Practice 7.

1. Execution renewed after the year and day, by the consent of defendant, the judgment not having been revived by scire facias, is not irregular.

Third persons cannot take advantages of irregularities.

JURY.

1. The jurors, by whom the prisoner was tried, were regularly drawn, according to the provisions of the act of assembly, and summoned by the sheriff. But no writ of venire had been delivered to him, as the act directs, until after the jury had been summoned. Held no cause for arresting the judgment.—*State, vs. Crosby*,

JUSTICE OF PEACE.

1. Action on the case, against a Justice of the Peace, for improperly issuing an execution, and causing plaintiff's horse to be sei-

zed and sold. The acts of 1812 and 1817, "for giving landlords and lessors a summary" mode of regaining possession, &c. requires two justices to execute it. Defendant acted alone, and issued execution for the costs. Held, that defendant was liable to an action, having acted without jurisdiction.—*Rambert*, ads. *Kelly*,

2. The act of 1778, requiring justices of the peace, before taking upon themselves to exercise the office, to sign a roll, to be lodged in the secretary of state's office, has become inoperative, and is virtually repealed:

And this, by long disuse; by subsequent laws, which, if not directly inconsistent with the provision, are evidently founded on the supposition that it does not exist; and by change of circumstances, which have rendered the provision inapplicable and unnecessary.—*Morrison*, ads. *Barksdale*,

LANDLORD AND TENANT.

1. Wife of a tenant, remaining in possession after her husband's death, shall not be permitted to set up a title against the husband's landlord.—*Love, vs. Dennis*,

2. Tenant shall not be permitted, by taking a lease from a third person, to aid such a one in setting up a title against the landlord.

3. Tenant, accidentally and without the consent of the landlord, extended her possession over the ideal line of the demised premises and enclosed a very small portion of the land in dispute; of which the landlord held a junior grant: Held that this possession of the tenant for five years would not enure to the benefit of the landlord, so as to give him a title to the disputed land by the statute of limitations.—*Jones*, ads. *Mickle*,

LOCATION.

1. Action on a penal bond to make title to "all that should remain

INDEX.

of a tract of land including the improvements; after taking off two hundred acres." The obligor may fix the location of the dividing line as he pleases, so that the improvements be included in the part to be conveyed, and tender of such title will save the condition of the bond; though perhaps an equitable partition might be enforced in another court.—*Walker, vs. Harshaw,*

2. In closing the line of a tract of land, which calls for an open corner, the line of another tract, which is called for as a boundary, should be pursued as far as it extends, though deviating from the course; when that fails, the course should be pursued: course and distance should govern, unless controlled by natural objects or artificial boundaries. *Martin, vs. Simpson,*

STATUTE OF LIMITATION.

See Usury, 3. Landlord & Tenant, 3.

1. The statute of limitations, which had begun to run against an intestate, is not, after his death, suspended until administration granted.—*Nicks, admr. vs. Martindale,*

The acknowledgment of an executor will revive a demand, barred by the statute of limitations at the time of the acknowledgment, which was not barred at the death of the testator.—*Pierce, vs. Zimmerman,*

3. Defendant on being shewn a note of hand, signed by himself, did not deny the hand writing, but said that his brother, who it seems has held and transferred the note, owed him money, and he would not pay a cent of it. Held not a sufficient acknowledgment to take the note out of the statute of limitations.—*Newcomb, vs. Niel,*

4. Defendant, maker of a promissory note, said "I gave the note, but it was for rotten tobacco, and I will never pay it; but I will not plead the statute of limitations." Held a sufficient acknowledgment to take the note

out of the operation of the statute.—*Exr. Glenn, vs. McCullough,*

LIEN.

1. Trover for a boat. Defence, that defendant had taken her up adrift and had a lien for salvage; which plaintiff had promised to pay, to the amount of forty dollars. No proof of the defendant's having saved the boat, but plaintiff's promise. Held that defendant had no claim for salvage; that if he had, it would not have authorized him to repair, and that plaintiff's promise gave him no lien.—*Holmes, vs. Hard,*

MISDEMEANOR.

1. Indictment under Stat. 1. Anne, St. 2, c. 9, for a misdemeanor in receiving stolen goods. The goods had been stolen by a slave, who was convicted of the larceny, before a court of magistrates and freeholders, and sentenced to be whipped. Held that as the principal had been convicted, the indictment could not be sustained under the statute, nor as for a misdemeanor at common law.—*State, vs. Council,*

2. An Indictment will not lie for rescuing goods, taken in execution, out of the possession of a constable; there being no assault on the constable.—*State, vs. Sotherlin,*

NEW TRIAL.

See Practice, 9.

1. Though in actions sounding altogether in damages, the court will not, in general, grant a new trial for excess or deficiency of damages; yet a different rule should prevail, when the pecuniary extent of the injury can be precisely ascertained: still subject however, to exceptions, as in cases of great mitigation or aggravation, or where it may be supposed that the jury were as competent to judge of the extent of injury as the witnesses.—*Hopkins. vs. Meyers,*

INDEX.

2. The defendant and another were indicted together for larceny. The jury found one guilty of grand, the other petit larceny, the proof being the same against both. Motion for new trial granted.—*State, vs. Larumbo*, 183
3. The court being satisfied from the affidavit furnished in this case, that it was not in the power of the plaintiff to produce the receipt against part of the account, on which defendant claimed a set off on the trial, were of opinion that a new trial ought to be granted.—*Glover, vs. Miller*, 267

NONSUIT.

See *Summary Process*, 2.

1. Plaintiff lost on a horse race an endorsed note for \$500, which he afterwards discharged, by delivering a horse and sundry securities. This was an action on the Stat. 9 Ann. c. 14, to recover treble the amount. The declaration contained two counts, one for money had and received, the other for the conversion of the articles. Nonsuit: the endorsed note was the thing lost, not the articles delivered in payment of it.—*Whilloch, vs. Bobo*, 421

NOTE OF HAND.

See *Bills of Exchange and Promissory Notes. Assignment*, 4.

NOTICE.

See *Endorser*, 2. *Recording* 1.

NUDUM PACTUM.

See "*Bills of Exchange and Promissory Notes*," 2.

1. Defendant in Havanna, engaged a passage to Charleston, for herself and slave, in plaintiff's vessel. Her promise at Havanna, to indemnify plaintiff against the damages he might sustain by bringing the slave into Charleston, in violation of the laws of the United States, would have been void; her promise after the seizure of the vessel and slave in Charleston, was nudum pactum. *Willinck vs. Davis*, 260

ORDINARY.

1. In a suit upon an Administration Bond, against the sureties of an Administrator, the court will not look into the grounds or regularity of the proceedings, upon which the ordinary founded a decree of a sum of money due by the administrator.—*Lyles, ordinary, vs. Brown*, 31

PARENT AND CHILD.

1. A mother is entitled to recover on a written contract made with her for that purpose, wages due for the labor of her infant son.—*Volentine, vs. Bladen*, 9
2. Submission to arbitration, by a father, on behalf of an infant child, with an award thereon, will bind the infant.—*Merrill, vs. Williams*, 300

PARTITION.

1. There must be a joint seizin in parties plaintiff and defendant, to sustain a suit for partition.—*Witherspoon, vs. Dunlap*, 390

PARTNERS.

See *Practice*, 14.

1. The firm having endorsed a note, one of the partners may, after dissolution, consent to the holder's compounding with and releasing the drawer, and his consent will bind the other partner to be answerable for the balance due.—*Union Bank, vs. Geo. & Wm. Hall*, 245

PATROL.

1. Defendant with others, assuming to act as a patrol, went into the house of plaintiff and took from thence two guns: Plaintiff was not then in his house, but a colored person, who had charge of the plantation: No captain of patrol was present, but the son of the captain of patrol, who claimed to command as being authorised by his father. Held that they were no lawful patrol and their act a trespass.—*Porteous, vs. Hazel & Jenkins*, 332

INDEX.

PENALTY.

1. The increased interest imposed by the legislature, on tax collectors who fail to pay over public monies in their hands at the time required by law, is not in the nature of a penalty; and the sureties of the tax collectors are liable for the payment of it.—*State, vs. Harrison. Same, vs. Seaborne,*
2. Defendant and one A. signed a note of hand for \$ 100, payable at four months, which A. passed to plaintiff, for a loan of \$ 50, with a verbal stipulation that if the \$ 50 were re-paid within the four months, the note should be given up. The declaration contained a count on the note and one for the money lent. Verdict for plaintiff, \$ 50 and interest. New trial granted, the court holding that if the note was not usurious, the plaintiff must recover the \$ 100 as a penalty; there was no pretence of a loan to defendant.—*Fowler, vs. Ward,*

88

372

PLEAS AND PLEADING.

See Practice, 4, 5, Replevin, 3. Evidence, 18

1. The declaration being in other respects complete and perfect, as a declaration in case, the words "with force and arms" will, after verdict, be rejected as surplusage.—*Marshall, ads. White.*
2. Trespass to try title, on writ on enquiry. Plaintiff's declaration claimed a plantation called "Green Grove," lying, &c. but set out no metes or bounds: Held that there was no such uncertainty of description, as to afford cause for arresting the judgment.—*Lahiffe & Lahiffe, vs. Hunter.*
3. Sum. Pro. stated that defendants were indebted to the petitioner \$ 50, for unlawfully beating his slave: Demurrer sustained; because it did not appear whether the process was brought for trespass or to recover a penalty given by statute.—*Kennedy, et. al. ads. Garlington.*

122

184

424

4. Defendant covenanted to deliver certain slaves when demanded: On *non est factum* pleaded to an action brought, it was held that the failure to prove a demand was no ground for nonsuit; and that defendant could not give evidence of performance: In covenant, the plaintiff is not required nor the defendant allowed to give evidence of any thing that is not put in issue by the plea.—*Mitchell, vs. DeGrafsenreid and Moorman.*

450

POSSESSION.

1. Grant to A. of two hundred acres; not including an adjoining portion of land, which was in dispute in this case. Conveyance to defendant, of one hundred and sixty acres, *part of A's grant*, in 1800; but so describing its boundaries, as to include the disputed land. Defendant had been in possession, within the lines of A's grant for twenty-five years, and the person under whom he claimed, since 1794. Land in dispute granted to plaintiff in 1819. *Held* that defendant's possession could not be extended, by construction, to the land in dispute; the conveyance to him restricting his claim to A's grant, though erroneously describing its boundaries; and consequently, that no presumption could arise of a grant of the disputed land, to him, from the state.—*Gibson, ads. Chappell,*
2. Trespass *Quare clausum fregit*. Plaintiff was in possession of a tract of land, part of which was covered by an older grant; of this part defendant was in possession. Held that plaintiff's possession could not be construed to extend to the land covered by the older grant, though within the lines of his own.—*Aiken vs. Jones,*

28

69

PRACTICE.

See Sheriff, 4.8.

1. Motion to set aside a judgment, on an affidavit of defendant's at-

INDEX.

torney, that plaintiff had consented to take it, subject to the plea of *plene administravit*, or *plene administravit præter*; no such agreement appearing in writing of on the record: to which plaintiff offered a counter affidavit. The court refused to receive the affidavits, and motion refused.—*Malcomson, vs. James, Adm'r.*

2. Action of debt on judgment: ordered for judgment and referred to clerk, May, 1810: the judgment entered on his assessment, set aside for the irregularity, May 1822: order for leave to enter up judgment, *nunc pro tunc*, made by the circuit court, fall term 1823: Motion to set aside that order, to arrest the judgment, and for leave to plead payment puis darrein continuance, on the grounds of plaintiff's death before the making of the order, of defects in the declaration, and that the case was out of court for want of proceeding: Refused.—*Vaughn & M'Lauchlin, ads. Dinkins,*

3. After pleading to the merits, it is too late to set aside proceedings in attachment, on the ground that the bond entered into by plaintiff, on the issuing of the writ, does not conform to the directions of the *Attachment Act*.—*Gray, ads. Young,*

4. After pleading to the merits, it is too late to take advantage of the omission to allege a day certain in the declaration, or of the omission to file a bill of particulars, by motion for a nonsuit, or in arrest of judgment.—*Long, vs. Kinnard,*

5. Mistake in setting forth plaintiff's name in the declaration, can only be taken advantage of by plea in abatement: unless in case of variance between declaration and a written contract offered in evidence.—*Chappell & Cureton, vs. Proctor,*

6. The amount of the verdict exceeded the damages laid in declaration. In such case, judgment cannot be entered up for the verdict, and a *venire facias*

do novo must be ordered, unless the plaintiff remit the excess beyond the sum claimed in the declaration. But as it appeared that the defendant had a discount, to a large amount, which he was obliged to withdraw on account of the absence of his witness, and therefore the plaintiff could not with safety enter a remittitur; a new trial was ordered, with leave to the plaintiff to amend his declaration, and to the defendant to plead his discount.—*Croxton & Co. vs. Addison.*

7. Writ of attachment issued in the name of *D. Brennan*. Order by the court, that "*Brennan & M'Creary, plaintiffs in attachment,*" have leave to file their declaration. Declaration filed in the names of *Brennan & M'Creary*, set aside for the irregularity.—*Brennan & M'Creary, vs. M'Leamore,*

8. Where defendant submitted the usual affidavit for a continuance, on account of the absence of witnesses, his daughters, and plaintiff offered to admit as their testimony, whatever defendant would state that they would prove; the court presuming that plaintiff must know what his daughters would prove, ordered on the case for trial: and new trial for this cause refused.—*Farrand, vs. Bouchell.*

9. Motion for continuance being generally a matter of discretion, depending on its peculiar circumstances, can seldom be the ground of a new trial.

10. After pleading to the merits, it is too late to take advantage of the plaintiff's omission to make oath of the debt or sum demanded, at the time of filing his declaration, in a proceeding by attachment.—*Stoney, vs. M'Neil,*

11. Leave given to amend, by adding a new count, after demurror and joinder.—*Cates, vs. Cureton,*

12. For defect in declaration, the circuit court ordered plaintiff to be non-suited or pay the costs: Plaintiff went to trial, but gave

INDEX.

notice of an appeal from the order directing him to pay costs: Appeal dismissed; the circuit court might make the order on such condition, and plaintiff accepted the terms by going to trial.—*Martin, vs. Mitchell & Davis*,

13. The service of a writ of *capias ad respondendum*, by delivering a copy, is not an arrest, within the meaning of the act of 1791, exempting from arrest persons necessarily attending on courts.—*Huntingdon, vs. Shultz & McKenna*,

14. One partner, after dissolution, executed a note in the partnership name, and accepted service of a writ in the same way, on which judgment was obtained by default: execution levied on the goods of the other partner, which were sold: one term intervened between the levy and the motion to set aside proceedings; which motion was granted.—*Loomis & Co. vs. Pearson & McMichael*,

15. After the adjournment of the court at which the verdict was obtained, it is too late for the defendant to obtain the order of the court for submitting the condition of a penal bond to a jury.—*Mitchell, vs. Humphries & Dawkins*,

16. Action on the case for procuring the defendant to be illegally arrested on a *ca. sa.* The declaration alleged that the *ca. sa.* had issued in a case in which "J. M." was plaintiff; but in the *ca. sa.* offered in evidence, "J. M. & Co." appeared to be plaintiffs: Held no variance; the words "and Co." having no signification.—*McCool, vs. McCluny*,

PRISON BOUND'S ACT.

1. The *Prison Bound's Act*, only requires the defendant to surrender so much property, as shall be sufficient to satisfy the debt for which he is arrested. Whether the property be sufficient for that purpose, is a matter, in the first instance, for the determination of the judge. The

judge may allow defendant's schedule to be amended, even after it is sworn to.—*Parravice-ne, vs. Schwartz*,

5. Bond for the prison bounds is assignable under the act.—*Tollison, ads. Miller*,

3. Assumpsit on an agreement not under seal, otherwise in the form of a bond for observing the rules, under the prison bounds act: Demurrer sustained; the security required by that act is a bond.—*Cantley, vs. Duren & Beckham*,

PROHIBITION.

—*See Constitutional Law, 4.*

1. A slave was tried for a misdemeanor by a justice of peace and two freeholders, sentenced and imprisoned. The freeholders in this case had not been summoned by warrant under the hand and seal of the justice; and one of them did not reside in the county where the offence was charged to be committed, nor had any freehold there. Held that the court was improperly organized, and prohibition granted.—*Ex parte, Richardson*,

PROMISSORY NOTE.

—*See Bills of Exchange and Promissory Notes.*

RECORDING.

1. One D. being indebted to both plaintiff and defendant, conveyed the land in dispute to defendant, in part payment of his debt, at its full value, pending a suit in equity against him by plaintiff; who afterwards obtained a decree and issued execution, upon which the land was sold and purchased by plaintiff. The deed to defendant was not recorded within six months, as required by law, but plaintiff had notice of it before his purchase, and before obtaining his decree. Held that the actual notice supplied the omission to record within six months, and that defendant's deed was valid as to plaintiff.—*Sherrard, vs. McFall*,

INDEX.

REPLEVIN.

1. The death of plaintiff in replevin abates the suit: nor will a writ, *de retorno habendo*, be awarded on such abatement.—*Miller, vs. Laughton*, 181
2. The act of 1806 provides, that the security given by plaintiff in replevin, shall be bound not only for the return of the goods, but for the rent due, and costs; and that the sheriff shall take bond, according to law, for a sufficient amount to cover the rent and costs.—*Duggan, vs. England*, 215
3. The condition of the bond in this case, was to prosecute the suit with effect, or return the goods or pay the value. Breach assigned, that the plaintiff in replevin had not prosecuted his suit to effect. On demurrer it was held that the breach assigned was insufficient; though the bond was not void. *Ib.*
4. On the return of *elongata* by the sheriff, to the writ *de retorno habendo*, the right of action accrues on the replevin bond, but *fi. fa.* cannot be issued till a writ of enquiry executed. *Ib.*
5. The commissioners of roads issued execution for a fine and levied on plaintiff's goods; writ of replevin, for re-delivery of the goods so levied on, was quashed.—*Lyah, vs. Commissioners of roads*, 336

REVOCATION.

1. Testator intending to alter his will and make a new one, gave directions for that purpose to witness, as he read over the will to him. The witness made memoranda, by interlining the proposed alterations in pencil, "for his own convenience." A single word was scored through with the pencil. Testator not having completed his directions the first day, was unable from weakness to complete them on a second, and the new will was never drawn: Held no revocation, the "obliteration" not being made by the direction of tes-

tator, nor intended to revoke the whole will.—*Means and others, vs. Moore*, 314

SEAL.

See Specially.

1. A warrant issued under the hand of a justice of peace, on which the defendant was taken, was held an effectual commencement of a prosecution, though the warrant was not sealed.—*State, vs. Vaughan*, 213

SETT OFF.

*See Failure of Consideration,
See Evidence 1.*

1. In an action by the administrator of an insolvent estate, defendant is not entitled to avail himself, by way of discount, of a negotiable note, made by the intestate and transferred to defendant after his death, to the full amount due on the note; but only to a reduction, rateably with other creditors.—*Happoldt, vs. Jones*, 109
2. Action on a promissory note given to plaintiff's intestate. Defendant offered as a sett off, that he had signed a note as surety for intestate in his life time and paid it since his death: Held a mutual credit, which might be set off under the discount act.—*Hinds, ads. Adm'r David*, 423

SHERIFF.

1. Action on the case. The defendant, a sheriff, levied an execution of the plaintiff against one K. on property which he left in K's possession, who left the state with it and failed to produce it on the day of sale. It was shewn in defence, that there were in defendant's office, executions against K. older than the plaintiff's, which would have taken the whole of the proceeds, if the property had been sold. Held that the plaintiff had sustained no injury, and was not entitled to recover.—*Gates, vs. Downs*, 72

INDEX.

2. Of Eighteen managers of elections, appointed by the legislature, in the district of Georgetown, two had refused to qualify; one was dead, and one disqualified to serve by being a candidate: Held that eight of the remaining fourteen, properly formed a board to determine on the validity of a contested election of sheriff; a majority of the managers *qualified to serve*, being all that is required by the act of the legislature.—*State, vs. Hug-gins*,

3. Sheriff taking bail bond, without seals annexed to the names of the sureties, and afterwards detaining the person arrested, and demanding money for fees, was held not justified in the detention, by the informality of the bond.—*Delessieline, ads. Bunch*,

4. Rule on sheriff to shew cause why the proceeds of the sale of a schooner, made under execution in this case, should not be paid over; cause shewn, that the schooner was mortgaged to a third person, and condition broken, before judgment rendered: Rule discharged.—*Payne, vs. Kershaw*,

5. The act of the legislature of 1822, requiring the governor, whenever a vacancy shall happen in the office of sheriff, to issue his writ to the managers of elections for the district, requiring them to hold an election to fill the vacancy, does not repeal that part of the act of 1808, which directs elections for sheriffs to be held by the managers, in all districts in which vacancies exist, on the second Monday in January and the day following in every year; nor is the writ of the governor necessary to the validity of these elections.—*State, vs. Durant*,

6. A fi. fa. and ca. sa. were both lodged in the sheriff's office, with orders to proceed on the fi. fa. After levy made, the sheriff was directed to proceed on the ca. sa. The goods levied on were sold

and the proceeds paid over to older executions. Before the return day of the ca. sa. the debtor died insolvent, and the ca. sa. was never executed. Held that the sheriff was not responsible.—*Delessieline, ads. King & Jones*,

7. Trover. Defendant, a sheriff, levied on two slaves under executions. After the levy, the owner sold them to plaintiff, subject to the sheriff's lien. Plaintiff offered to pay the amount of the executions, but made no tender. Defendant refused to deliver up the slaves, and afterwards sold them. Held that the action would not lie.—*Vincent, vs. adm'r. Perry*,

8. On a rule against the sheriff to shew cause why he had not made the monies on certain executions, he returned that before the lodging of the executions, defendant had mortgaged certain slaves to one R. that the mortgage was not recorded; that the slaves had been sold by him (the sheriff,) and that the money was in his hands, to be paid to the satisfaction of the mortgage or the executions, as the court might direct: Rule discharged and parties left to contest their rights at law.—*Bruton and others, vs. Cannon*,

SLAVES.

1. The act of assembly of 1822, authorizing sheriffs to seize "free negroes or persons of color" on board vessels coming into port, and to detain them 'till the vessel is ready to depart, does not relate to slaves.—*Calder, vs. Delessieline*,

SPECIALTY.

1. The word "sealed," inserted in the body of an instrument, promising to pay money, will not make it a specialty, without a seal, an (L. S.) or some equivalent mark annexed.—*Mitchell, vs. Parham & Davis*,

357

386

380

188

3

INDEX.

SUMMARY PROCESS.

See Pleas and Pleading, 3.

1. In a proceeding by summary process, defendant was required to answer on interrogatories, whether he had made his mark to a note, and whether he justly owed an account; copies of which were filed with the process; and held that a decree for the amount of the note and account was properly given against him, on his neglecting to answer.—*Walker, vs. Mathaney.*

2. Plaintiff in sum. pro. stated his demand to be on a note of hand for \$35, which was lost; a copy of such note was annexed to the process. On trial, he proved that a payment of \$5 had been made on the note for \$35, which was taken up and a new note for \$30 given: Non-suit ordered, and motion to set it aside and amend, refused.—*Miller, vs. Steen,*

SURETY.

See Penalty 1. Evidence, 23.

TENANTS IN COMMON.

1. Defendant and one Lites were tenants in common of a field: Lites, without the consent of defendant, leased the whole field to plaintiff, who planted it in corn; defendant entered and ploughed up part of the corn, on a portion of the field which he claimed to cultivate himself, by agreement with Lites. Held that plaintiff could not maintain action for this trespass. One tenant in common cannot maintain trespass against his co-tenant, without actual ouster.—*Harman, vs. Gartman,*

TIME.

1. Action on a promissory note. Detence, failure of consideration. The note was given for negroes. They were proven to have been, about twenty seven years ago, the property of B. who died about that time, leaving other slaves, and a wife, two sons and a daughter. After B's

death, the negroes went into the possession, and have since continued in the possession of his daughter—or of her trustee, agents or assignees. No administration or distribution of the estate of B. shewn. Held that after so long possession, with the fact that B. died possessed of other slaves, a distribution of B's estate will be presumed; and that the slaves in question were the share of the daughter.—

Reed, vs. Price,

3

187 2. The lapse of twenty years will raise the presumption of performance of any other condition of a bond, as well as that for the payment of money.—*Ordinary, vs. Steedman,*

287

TRESPASS AND TRESPASS ON THE CASE.

1. *Trespass* and not *case* is the proper remedy against a justice of peace, who has issued execution in a matter without his jurisdiction, and caused the plaintiff's horse to be seized and sold. *Rembert, vs. Kelly,*

65

2. An *Action on the case* cannot be maintained for an injury done by beating the plaintiff's slave. *Trespass, vi et armis*, is the only proper remedy.—*Carsten, vs. Murray,*

113

3. The right to the use of a pew, the possession of the church being in the corporation, is an incorporeal hereditament; for disturbance in the enjoyment of which, an action of *trespass vi et armis* will not lie.—*Marshall, ad. White,*

122

4. *Ca. Sa.* being void, the judgment on which it issued having been irregular and set aside, trespass and not case was the proper action for the arrest — *McCool, vs. McCluny,*

486

TROVER.

See Sheriff, 7.

1. Trover. After the execution of the treaty ceding Florida to the United States, and its ratification by the government of the United States, but before its

INDEX.

ratification by Spain, the plaintiff, a British subject, introduced slaves into Florida and put them into the possession of one H. The slaves broke into insurrection and committed various outrages. An officer of the United States' army, at Amelia Island, at the request of the wife of H. (who was absent) and by permission of the Spanish governor to enter Florida for the protection of the inhabitants, sent a party who seized the slaves, and they were detained in the custody of defendant till ordered to be given up by the government. While in custody, one of the slaves, attempting to escape, was shot by a sentinel. Held that the seizure and detention were excusable and defendant not liable.—*Payne, ads Robinson,*

2. Trover for Cotton. The proof of conversion relied on was, that defendant having lost cotton, and having cause to suspect that it was in plaintiff's possession, obtained a search warrant and was in company with the constable who seized cotton, answering the description of defendant's, in plaintiff's possession. No proof of a demand on defendant, or that he had been in possession of the cotton seized. Verdict for defendant, and new trial refused.—*Slack, vs. Littlefield,*

279

298

USURY.

1. Defendant applies to plaintiff, to borrow money, who has none, but offers him a note for seven hundred dollars, on a third person, whom he understood to have cotton ready to pay it. Plaintiff accepts it, and gives his own note for seven hundred and seventy dollars, payable at the end of a year: Held Usury.—*Brown, vs. Faussett,*
2. Action by indorsee against endorser of a note. Defendant gave notice of an intention to offer himself as a witness, to prove usury. To prevent this, plaintiff offered himself as a witness, and swore that he obtained the note for a full conside-

ration of one D. Defendant was then examined, and swore that he endorsed the note, for the accommodation of the maker, and passed it to D, at an usurious discount. D, being then examined, denied the usury sworn to by defendant. Held that under the provisions of the statute of usury, defendant was an incompetent witness, and new trial granted for that cause.—

Wallis, vs. Nelson,

144

3. The act against usury, after fixing a penalty of three times the amount of any usurious loan, to be recovered by action of debt, &c. limits the commencement of the action to six months after the offence committed. Plaintiff lent \$100, on usurious interest, and received various sums on account of the loan, more than six months before action brought, and the balance of principal and usurious interest, within six months: Held that plaintiff was entitled to recover three times the amount originally loaned.—

Stewart, vs. Fowler,

403

4. Defendant's property being taken in execution at the suit of A. B. for \$1400, defendant, in order to obtain one month's stay of sale, agreed to pay \$100, and gave the note on which the action was brought to the plaintiff, to whom A. B. was indebted; plaintiff crediting A. B. with the amount, and he guaranteeing the payment of the note to plaintiff: Held that the note was usurious, and void in plaintiff's hands.—*Cleveland, vs. Dare,*

407

VARIANCE.

See Practice.

VERDICT.

See New Trial, 2.

1. In trespass to try title, the jury found that "the old hedge row, &c." was the dividing line between the parties. The metes and bounds of the plaintiff's claim being set out in the proceedings, and the contest turning altogether on this boundary,

81

INDEX.

it was held, that the verdict was sufficiently certain for entering up a judgment; and if otherwise, the intention of the jury being perfectly clear, the verdict might be amended.—*Hopkins, vs. Myers,*

2. The verdict of a jury "we find for the plaintiff, and assess damages to ———," is sufficient in a suit on sheriff's bond, to authorize the entry of judgment, on the issue of non est factum.—*Treasurer, vs. McGuire,*

WARRANT.

See Stat.

WARRANTY.

See Failure of Consideration, 2.

1. A slave was sold, who had before committed burglary; the fact being unknown, both to seller and purchaser. After the sale, he was convicted and his ears cropped. Held that the implied warranty did not extend to the loss of value thereby occasioned.—*Owens, vs. Ford,*

WILL.

See Revocation.

WITNESS.

1. The court has no power to discharge the bail in a civil action, in order to render him a competent witness.—*Gray, ad. Young,* 38
2. That a witness merely believes himself interested in the event of the suit, does not render him incompetent.—*Havis, vs. Barkley,* 63
3. One who had guaranteed the ultimate payment of a bond, was held an incompetent witness to prove that it had not been paid to himself, while it was in his possession, assigned in blank.—*Stoney, vs. McNiel,* 156
4. The endorser of a promissory note is a competent witness to prove, in an action against the drawer, that it has been paid.—*Nichols, vs. Artman,* 285
4. Plaintiff and defendant claimed the same slaves, under different bills of sale from one W. B. Held that W. B. was a competent witness to prove that plaintiff's bill of sale had been obtained by fraud.—*Willbourn, vs. Parham,* 375

26

474

25

25. 1. 1. 1.

25. 1. 1. 1.

